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Nos. A-1010
A-1012

In the Supreme Court of the United States

October Term, 1981

BOSWELL, INC. dba BROADACRES,
Appellant,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

AND

BOSWELL, INC. dba RENO COUNTY ADULT CARE HOME,
Appellants,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Boswell, Inc., Appellant, appeals from the final judgments of the Supreme Court of Kansas, dated February 27, 1982, and prays that an order be entered noting probable jurisdiction of the appeals.

QUESTIONS PRESENTED

1. Do the provisions of the state statutes which grant and delegate to the Kansas Department of Health and Environment, an agency of the State of Kansas, in broad and general terms the power to license and regulate nursing homes in the state of Kansas offend and violate the due process and equal protection clauses of the 14th Amendment to the United States Constitution?

2. Do the provisions of the state statutes governing nursing home licensure and certification in the state of Kansas and the regulations adopted thereunder permit an arbitrary and discriminatory granting or denial of a nursing home license and certification in violation of due process and equal protection afforded under the provisions of the 14th Amendment to the United States Constitution?

3. Are state statutes and regulations governing the granting and denial of licenses to nursing homes subject to the due process requirement of the 14th Amendment to the United States Constitution precluding vagueness and indefiniteness?

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the Supreme Court of Kansas, which appears in the appendix hereto, pp. A1-A19, is reported at 230 Kan. 738, ... P. 2d ....., and 230 Kan. 611, ... P. 2d .....

The decisions and judgments of the trial court, District Court of Reno County, Kansas is not reported, but appears in the appendix hereto, pp. A20-A25.

JURISDICTION

The judgments of the Supreme Court of Kansas, entered on the 27th day of February, 1982, upheld the order of denial of licensure and certification to Appellant's nursing home facility by a state administrative agency under an attack by Appellant that the statutory scheme and regulations relied upon bv the administrative agency for its order of denial was unconstitutional and deprived Appellant of due process and equal protection of the law afforded by reason of the 5th and 14th Amendments to the United States Constitution.

The Notice of Appeal was filed in the Supreme Court of Kansas on May 26, 1982, and an order extending Appellant's time to docket this appeal to June 28, 1982 was granted by the Hcnorable Justice Byron R. White on May 25, 1982.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(2), this being an appeal which draws into question the validity of state statutes and regulations as being repugnant to the Constitution of the United States.

In the event that the court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U.S.C. Sec. 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the 14th Amendment of the Constitution of the United States provides as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 39-926, cited as K.S.A. 39-926, of the Kansas Statutes Annotated, provides:

> "It shall be unlawful for any person or persons acting jointly or severally to operate an adult care home within this state except upon license first had and obtained for that purpose from the secretary of health and environment as the licensing agency upon application made therefor as provided in this act, and compliance with the requirements, standards, rules and regulations, promulgated under its provisions."

Section 39-931, cited as K.S.A. 39-931, of the Kansas Statutes Annotated, provides:

> "Whenever the licensing agency finds a substantial failure to comply with the requirements, standards, or rules and regulations established under this act or that a receiver has been appointed under K.S.A. 39-958, it shall make an order denying, suspending,

or revoking the license, and said order shall set forth the particular reasons for the action taken. Such order shall be served upon the licensee or the applicant by personal service or by certified mail, return receipt requested. Unless appealed from as hereinafter provided, said order shall become final and effective twenty (20) days from the date of its issuance.

Any applicant or licensee who is aggrieved by said order may appeal within twenty (20) days after its issuance by filing with the licensing agency a written notice of appeal and said notice shall specify wherein said order is unreasonable, unjust, or illegal. Upon receipt of such notice it shall be the duty of the licensing agency to fix a date for hearing which shall not be later than fifteen (15) days after the date of receipt of the notice of appeal. The licensing agency shall prescribe by rule and regulation the procedure for hearing all appeals and may designate a member or members of the staff of the licensing agency as an appeals referee or committee who shall have authority to subpoena witnesses, and administer oaths, take testimony, and render decisions. On the basis of any such hearing or upon default of the applicant or licensee the appeals referee or committee shall make a determination specifying its findings of fact and, where indicated, conclusion of law.

A copy of such determination shall be sent by certified mail, return receipt requested, or served personally upon the applicant or licensee. Pending the appeal a license previously issued shall remain in force. In case the decision at the hearing sustains the decision of the licensing agency in denying, suspending, or revoking the license, the applicant or licensee shall be given fifteen (15) days after the decision is mailed

or served to comply with the decision made at the appeal hearing. Nothing herein shall be construed to prevent the licensing agency from commencing immediately an action for injunction or other process to restrain or prevent the operation of any licensed home which the licensing agency, upon investigation, shall have found to be operated or maintained in such a manner as to constitute a clear and immediate threat to the lives or health of its residents. Any such action shall be brought in the district court in the county in which the home is located, and shall be filed by the county attorney or district attorney of such county or the attorney general. Any applicant or licensee aggrieved by the order of the licensing agency in denying, suspending, or revoking a license may appeal therefrom by filing a petition specifying the action of the licensing agency appealed from, in the district court of the county in which the applicant or licensee resides, within fifteen (15) days after receipt of a copy of the order of the licensing agency, and said court shall have jurisdiction to affirm, reverse, modify, or vacate the order complained of if the court is of the opinion that the order was arbitrary, unlawful, or unreasonable.

Within seven (7) days after the petition has been filed in the district court, notice of the appeal shall be given to the licensing agency by mailing certified copies of the petition, by certified mail. Upon receipt of such notice, the licensing agency shall forthwith make available, for examination and inspection, to the applicant and the applicant's attorney all its records pertaining to such matter. From the judgment of the district court, appeal may be taken as in other civil actions. An appeal to the district court or an

appellate court shall not operate to stay the effect of an order of the licensing agency, unless the judge or the court shall specifically allow such a stay."

Section 39-932, cited as K.S.A. 39-932, of the Kansas Statutes Annotated, provides:

"The licensing agency shall adopt, amend, promulgate and enforce such rules, regulations and standards as may be deemed practicable, reasonable and necessary with respect to all adult care homes, to be licensed hereunder and as may be designed to further the accomplishment of the purpose of this law in promoting safe, proper and adequate treatment and care of individuals in adult care homes in the interest of public health, safety and welfare. Such rules and regulations may prescribe minimum standards and requirements relating to the location, building, construction, size, equipment and facilities of adult care homes, the number and kind of residents allowed, the types of care offered, the records to be kept, the kind and frequency of reports and inventories to be made, and may generally establish such requirements as may be deemed necessary to protect the health, safety, hygiene, welfare and comfort of the residents.

Adult care homes which are in operation at the time of promulgation of any applicable rules and regulations or minimum standards under this act shall be given a reasonable time, under the particular circumstances not to exceed twelve (12) months from the date of such promulgation within which to comply with such rules and regulations and minimum standards. The licensing agency may further establish by regulation a system whereby it may, on the basis of the investigations and evaluations herein provided

for, uniformly rate adult care homes in terms of the quality and quantity of services and facilities provided."

Sections K.A.R. 28-39-30 through 28-39-50, referred to as Kansas Administrative Regulations, adopted under the authority of K.S.A. 39-932, referred to above.

Section 42 U.S.C.A. Sec. 1396 et seq.

Section 42 C.F.R. Sec. 442.250 et seq.

STATEMENT OF CASE

Appellant is a family corporation, formed by Frank and Mary Boswell, husband and wife, in 1969 to operate nursing homes in the state of Kansas.

Mary and Frank Boswell assumed the operation of an old county-run nursing home sometime in 1968, by leasing the premises from the county of Reno. The home had been operated by the county to house elderly welfare recipients and the Boswells continued to provide for the care of such patients upon the transition to them.

In 1970, the county built another facility adjacent to the existing facility, to accommodate the expanding need, and leased it to the Boswells. From that date, the Boswells, through their family corporation, operated both facilities under lease from the county.

The two facilities, or nursing homes, operated under separate licenses from the state, and later separate medicaid certification, even though the facilities were within feet of each other. For operational and licensure purposes, the two homes were designated as "Broadacres" and the "Reno County Adult Care Facility".

Licenses and certification for the facilities were granted and renewed each year, and from the time period of 1968 through 1979 the facilities experienced no difficulty with licensing and certification. As is the case with every other nursing home in the state, some violations, or deficiencies, were found or noted on the annual survey, but a plan of correction was submitted to the licensing agency and the license was renewed and certification granted.

In the absence any unusual event, or a history of poor case or harm to a patient over the span of roughly ten years, to explain or justify the coming event, both of the facilities, simultaneously, began to experience difficulty with licensure and certification in 1979. While the "Broadacres" facility was being operated in a much older building than the Reno County Adult Care Facility, the latter being built in 1970, both facilities lost their licenses together, raising the inference that the Boswells were the target rather than the operations.

Contrary to the pattern established over the previous years of operation, the facilities' plan of correction for minor deficiencies were rejected, and upon follow-up surveys new deficiencies would be cited in areas inspected and passed a few months, or weeks earlier. In the interim period, no changes would have occurred in these areas, or the operation of the facility, or regulations to justify the new deficiencies. And when the new deficiencies would be addressed by the facilities, others would be cited, until finally the homes were ordered closed with less noted deficiencies than existed in the past when the homes were licensed and certified. Simultaneous with the closing of Appellant's facilities, the licensing agency was granting licenses and certification to other nursing homes in the state, as demonstrated by the agency's public records, with existing deficiencies far in excess, both quali-

tatively and quantitatively, of those shown for Appellant's homes. Additionally, the history of some of the homes licensed, as shown by the public record, were poor, comparatively speaking.

Eventually, the Kansas Department of Health and Environment, the state agency that grants and denies licenses to nursing homes in the state of Kansas, denied licenses to the homes in January of 1980 and ordered both homes closed. Appeals were taken within the agency from the denial, and the agency later affirmed its earlier denial order on May 19, 1980 and August 25, 1980, respectively, for the Reno County Adult Care Facility and Broadacres.

Timely appeals were taken from the administrative orders to the District Court of Reno County, Kansas, which affirmed the orders denying licensure and certification to the facilities. The judgment of the District Court was made upon the record of the administrative agency, and the court reviewed the agency's order under the limited standard of the state statute, K.S.A. 39-931, whether the order was arbitrary, unlawful, or unreasonable.

The District Court did not address the constitutional, or federal questions presented by Appellant. Appellant appealed to the Supreme Court of Kansas from the District Court decision, and after the submission of briefs and oral arguments, the District Court was affirmed.

As with the trial court, Appellant asserted and questioned the validity of the state statutes and regulations governing licensure under the due process and equal protection clause of the 14th Amendment to the United States Constitution in the state Supreme Court. In both brief and oral argument, Appellant asserted that the licensure statutes and regulations violate rights of due process and

equal protection afforded by reason of the 14th Amendment to the United States Constitution. The Supreme Court of the State of Kansas rejected those arguments by its silence, except for the passing comment that:

> ". . . (A)mendments which provide for the licensure of adult care homes, do not constitute an unlawful delegation of legislative authority and are not constitutionally impermissible as being vague and indefinite."

and affirmed the denial of licenses and certification to the facilities under the limited standard that the agency order was not arbitrary, unlawful, or unreasonable.

THE QUESTIONS ARE SUBSTANTIAL

The court below limited its analysis to whether the order denying a license and certification to Appellant's nursing homes was arbitrary, fraudulent, or unlawful, and gave only passing consideration to the substantial federal questions.

The important federal questions relating to whether the statutory scheme governing licensure of nursing homes in the state of Kansas violated due process and equal protection of the laws afforded by reason of the 14th Amendment to the United States Constitution received virtually no attention in the court's analysis and decision in upholding the constitutionality of the statutes and regulations under attack by Appellant.

It would have been proper, as it will be for this court, for the court below to have addressed the federal questions upon the contentions of Appellant, even though the proceedings concern administrative orders, inasmuch as the actions of the administrative agency affected liberty and property interests protected by the 14th Amendment

to the United States Constitution. The granting and denying of licenses have long been recognized as involving liberty and property interests protected by the 14th Amendment. *Mackey v. Montrym*, 443 U.S. 1, 61 L.Ed. 321, 99 S.Ct. 2612 (1979); *Dixon v. Love*, 431 U.S. 105, 52 L.Ed. 2d 172, 97 S.Ct. 1723 (1977).

As with most businesses and occupations requiring licenses to operate, the only lawful way to operate a nursing home in the state of Kansas is by acquiring and maintaining a license from the state. The liberty and property interests are substantial, particularly in view of the fact, as with the Boswells, the homes are operated as the only means of a livelihood and as an occupation.

The court below properly recognized that an administrative agency may be delegated rule-making and adjudicatory functions, but did not consider whether the statutory scheme governing the licensing of the nursing homes of Appellant clothed the agency with arbitrary power in its delegation, which would permit arbitrary and discriminatory denial of licenses in violation of due process and equal protection.

It is said at 1 AmJur 2d, *Administrative Law*, Sec. 147:

> "It is almost universally held that arbitrary powers may not be conferred upon administrative agencies either in the exercise of rulemaking or adjudicatory functions, and that in order to avoid a delegation of legislative power, a violation of due process of law, or denial of equal protection of the laws, the legislature in conferring determinative or adjudicatory powers, as well as in conferring rulemaking powers, generally cannot leave the determinatioon to the uncontrolled discretion of the administrative agency but must declare a policy and fix a primary standard or limit to control the discretion of the agency."

Yick Wo v. Hopkins, 118 U.S. 356, 30 L.Ed. 20, 6 S.Ct. 1064, represents an earlier, yet viable expression, that statutes and regulations, though appearing fair and impartial on their face, if permitting of an unequal application, offend the 14th Amendment to the United States Constitution.

The statutory scheme in question confers upon the administrative agency the power to grant, deny and revoke licenses for nursing homes, but does not confine and restrict the power granted, except to say, in essence, that the agency may deny a license to a nursing home if the agency should find that the home has failed to substantially comply with the rules and regulations promulgated by the agency. It is left up to the agency to define substantial compliance. This has permitted the licensing agency, in licensing nursing homes in the state, as demonstrated for the record, to grant and deny licenses in an arbitrary and oppressive fashion.

The due process and equal protection implications are compounded by the adoption of vague and broad regulations by the agency under its rule-making power which the nursing homes must substantially comply with to be licensed. It has long been recognized by this court that the due process clause forbids vague statutes, and this court has applied the same restrictions to regulations which govern economic or commercial activities, if a violation can engender penalties, such as a denial of a license, *Lemberos v. Laurel Racecourse, Inc.*, 489 F. Supp. 1376 (1980).

This court noted in *Graymed v. City of Rockford*, 408 U.S. 104, 33 L.Ed. 2d 22, 92 S.Ct. 2294 (1972) that:

> "Vague laws offend several important values: first, vague laws may trap the innocent by not providing fair warning; second, vague law impermissibly

delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application; and third, where a vague statute abuts on sensitive areas of basic first amendment freedoms, it operates to inhibit the exercise of those freedoms."

See also *Michini v. Rizzo*, 379 F. Supp. 837, 849 (1974).

Several state courts have struck down nursing home statutes and regulations similar to the ones enforced against Appellant as offending the 14th Amendment rights of due process and equal protection against vagueness and discrimination. *Highridge Management Corp. v. State*, 354 So. 2d 377; *Holbl v. Whalen*, 406 N.Y.S. 2d 621; *Levin v. Whalen*, 378 N.Y.S. 2d 800.

The vagueness of the regulations applied by the licensing agency herein, coupled with the lack of an explicit standard to control the granting and denying of licenses and certification, enabled the agency to arbitrarily and discriminatorily enforce the rules against Appellant and others who may fall out of favor with the agency or members of the agency, and when a nursing home, such as Appellant's, finds itself in that position, it is unable to defend against the deprivation of substantial liberty and property interests, for the lack of definitive standards and guidelines permits the agency to place interpretations on its regulations which serves the agency's position at the moment. The limited and restricted analysis of the court below did not adequately address the substantial federal questions raised by the existing statutes and regulations applied to deprive Appellant of substantial liberty and property interests.

CONCLUSION

For these reasons, this court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

No. 53,379

BOSWELL, INC., d/b/a BROADACRES,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

SYLLABUS BY THE COURT

1. The scope of court review contemplated by K.S.A. 39-931 (Ensley) of an order of the Department of Health and Environment refusing to issue a license to an adult care home is limited to determining whether the order was arbitrary, unlawful, or unreasonable. On appeal a court is restricted to considering whether as a matter of law (1) the administrative tribunal acted fraudulently, arbitrarily, or capriciously, (2) the administrative order is supported by substantial evidence, and (3) the tribunal's action was within the scope of the authority of the administrative tribunal.

2. K.S.A. 39-923, *et seq.* (Ensley), and amendments which provide for the licensure of adult care homes, do not constitute an unlawful delegation of legislative authority and are not constitutionally impermissible as being vague and indefinite.

3. The record of administrative action in denying licensure and certification of an adult care facility as an intermediate nursing care home is examined on appeal, and it is *held*, the administrative tribunal acted properly, its denial of licensure and registration is supported by sub-

stantial competent evidence, and its order of denial was within the scope of its authority.

Appeal from Reno district court, PORTER K. BROWN, judge. Opinion filed February 27, 1982. Affirmed.

Robert L. Taylor, of Hutchinson, argued the cause and was on the brief for the appellant.

Emily E. Cameron, of Kansas Department of Health and Environment, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

FROMME, J.: This is an administrative appeal authorized by K.S.A. 39-931 (Ensley). The appeal is from an order of the Department of Health and Environment denying licensure and certification as an intermediate nursing care home to Boswell, Inc., d/b/a Broadacres. This facility was located in Reno County near the city of Hutchinson, Kansas. The building was rented from the county by Mary and Frank Boswell in 1969, and a family corporation, Boswell, Inc., was organized to operate this and one other nursing home. This appeal only concerns the facility referred to as Broadacres. Broadacres was operated until it was ordered closed January 1, 1980. Most of the seventeen persons who occupied the facility at the time of the closing were recipients of federal benefits in the medicaid program. A state licensed adult care home has to meet the federal certification standards to participate in the medicaid program.

A yearly survey of all nursing homes in Kansas is made by the Kansas Department of Health and Environment. As a result of the survey of Broadacres made at the end of September, 1978, the facility was found not to be in substantial compliance with the rules and regulations

set by the department to govern intermediate nursing care homes. License renewal was denied in October, 1978. Later, on October 13, 1978, a second survey was completed to determine if federal certification requirements could be met. The facility did not meet the federal requirements and recertification was denied. The Boswells were notified that the deficiency findings could be discussed in conference with the department on November 2, 1978. They did not confer. The denial of the order refusing to renew the license was appealed. The appeal was heard by a hearing officer and the order revoking the license was affirmed. During this period a third survey and inspection for licensure was carried out. This was during the middle of July, 1979. Again the facility was found in substantial noncompliance with nursing home requirements.

Thereafter the Boswells gave up on the appeal of the revocation proceedings. Instead of appealing the revocation proceedings to the courts, they filed a new application for licensure and certification with the department. The premises were surveyed and inspected a fourth time by the department. This was about the middle of November, 1979. The facility was not in compliance with state and federal requirements and the application was denied.

This latter order denying the new application was appealed and it is the order presently on appeal before this court. The Reno County District Court examined the 911 page transcript of proceedings, including various exhibits, and affirmed the order denying licensure and certification which was issued by the Secretary of the Department of Health and Environment. This court in turn has examined this transcript, the exhibits and the briefs of the parties and will consider the contentions of the appellant.

The appellant first argues for a full de novo review of the proceedings by this court. This is a review of an administrative order denying licensure and certification. The scope of review contemplated by 39-931 is stated:

> "Any applicant or licensee aggrieved by the order of the licensing agency in denying, suspending, or revoking a license may appeal therefrom by filing a petition specifying the action of the licensing agency appealed from, in the district court of the county in which the applicant or licensee resides, within fifteen (15) days after receipt of a copy of the order of the licensing agency, and said court shall have jurisdiction to affirm, reverse, modify, or vacate the order complained of *if the court is of the opinion that the order was arbitrary, unlawful, or unreasonable.*
>
> ". . . From the judgment of the district court, appeal may be taken as in other civil actions. An appeal to the district court or an appellate court shall not operate to stay the effect of an order of the licensing agency, unless the judge or the court shall specifically allow such a stay." Emphasis supplied.

The scope of court review contemplated by 39-931 of an order of the Department of Health and Environment refusing to issue a license to an adult care home is limited to determining whether the order was arbitrary, unlawful, or unreasonable. On appeal a court is restricted to considering whether as a matter of law (1) the administrative tribunal acted fraudulently, arbitrarily, or capriciously, (2) the administrative order is supported by substantial evidence, and (3) the tribunal's action was within the scope of the authority of the administrative tribunal. See *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447, 450, 436 P.2d 828, 28 A.L.R.3d 472 (1968); *Olathe Hospital Foundation, Inc. v. Extendicare, Inc.*, 217 Kan.

546, 539 P.2d 1 (1975); *Kansas Dept. of Health & Environment v. Banks*, 230 Kan. 169, Syl. ¶ 1, 630 P.2d 1131 (1981).

Appellant next contends the statute and regulations adopted by the Department of Health and Environment with regard to the licensing of adult care homes constitute an unlawful delegation of legislative authority and are constitutionally impermissible as being vague and indefinite.

The legislature may enact general provisions for regulation and grant to *state agencies* certain discretion in filling in the details, provided it fixes reasonable and definite standards to govern the exercise of such authority. *Gumbhir v. Kansas State Board of Pharmacy*, 228 Kan. 579, 584, 618 P.2d 837 (1980).

Appellant fails to consider the law and the regulations in their entirety. K.S.A. 39-923 (*a*) (3) (Ensley) fully defines an intermediate nursing care home. The purpose of the act is clearly stated in 39-924. The requirements governing issuance of a license, covering inspections and investigations, providing for renewability, nontransferability, display and contents of the license are set forth in the provisions of the statute which follow in the other sections of the act. The Department of Health and Environment as the licensing agency is specifically authorized by 39-926 to establish necessary standards, rules and regulations for the operation and licensure of these facilities.

In addition thereto the rules and regulations of the Department of Health and Environment relating to the adult care homes were adopted in accordance with K.S.A. 1981 Supp. 77-420 and 77-421, which require approval by the secretary of administration and the attorney general,

plus public hearings after notice. Then under 1981 Supp. 77-426, provision is made for examination, modification or rejection of these regulations by the legislature. Thus the regulations are indirectly regulations which have been approved and adopted by the legislature.

Appellants also claim that the law and regulations are vague and indefinite. The few phrases or words specifically pointed to by appellant have well understood common meanings and are neither vague nor indefinite.

K.S.A. 39-923, *et seq.* (Ensley), and amendments which provide for the licensure of adult care homes, do not constitute an unlawful delegation of legislative authority and are not constitutionally impermissible as being vague and indefinite.

We turn next to the question of whether the order of the agency was supported by substantial competent evidence. The secretary approved the findings of the hearing officer. There were some thirty instances in which specific requirements for the health and safety of residents in the adult care home were found to have been violated. These violations need not be specifically tied to each respective regulation violated. Suffice it to say noncompliance was found in regard to the regulations beginning with K.A.R. 28-39-31 and continuing through K.A.R. 28-39-44. After examining the transcript we have no hesitation in saying the order denying licensure and certification was supported by substantial competent evidence in the following particulars:

Broadacres had neither an approved physical therapy room nor a physical therapy program. The facility had a single utility room in which dirty nonsterile bedding and clothing were kept next to clean bedding and clothing. The employees were not properly trained for their jobs.

Five of those working as nurses aides were not qualified as nurses aides. Personnel records on employees were not kept up to date. Records covering the admission and discharge of patients were not available in the files. A mental patient continued to be kept in the facility in direct violation of regulations applying to intermediate nursing care homes. The occupational therapist worked at this facility less than one hour a month, although her contract required two or three hours a month. There was no activity schedule or program for the residents in the home. There was no attempt to provide marked diet trays for residents needing special diets. Food supplies were inadequate at times and at other times too much food was cooked and later served as leftovers. The pharmaceuticals in the storage room were badly in need of organization and labeling. Narcotics were not properly kept under lock. Nonsterile supplies were kept in the room and the medicines were served in soiled cups. Staffing requirements for the facility were not met and there was no full time person in charge of medical records. There was no infection control committee headed by a designated doctor or nurse at the facility. There was no workable plan in force to deal with outbreaks of infectious diseases, such as influenza. There were no procedures set up for isolation of patients with infectious diseases.

In addition to the foregoing violations of specific regulations we find that K.S.A. 39-931a (*b*) (Ensley) provides that denial of licensure may be based on repeated violations or failure to correct previous violations. Many of the violations existed and continued through two or more inspections. As many as nine of those violations mentioned above were noted in at least four separate inspections, including the final one before the nursing home was closed.

Appellant's contention that they were not given an adequate opportunity to correct the deficiencies is clearly disproved by the record. A ninety day provisional license was issued at one time to permit the Boswells to correct these shortcomings. At the end of this period a major portion of the list of violations had not been corrected.

Appellant contends that federal certification was improperly denied because no violations of federal regulations were established. Under the federal regulations regarding certification of a facility for Title XIX medicaid patients, certification cannot be approved unless and until the facility is licensed by the state. 42 C.F.R. 442.251. In addition, the state regulations follow the federal regulations closely because many of these adult care homes are heavily dependent upon federal money from the medicaid program to meet their expenses. We have compared the federal regulations with the state regulations and substantial violations of the federal regulations are evident. It was proper for the department to hold this facility in substantial noncompliance with the federal regulations affecting federal certification under Title XIX for care of medicaid patients.

The order denying licensure and federal certification was not arbitrary, unlawful, or unreasonable. The judgment of the district court is affirmed.

No. 52,737

BOSWELL, INC., d/b/a RENO COUNTY ADULT CARE HOME,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

SYLLABUS BY THE COURT

1. Neither the district court nor the appellate court has the liberty to reweigh the evidence and substitute its judgment for that of the administrative agency.

2. K.S.A. 39-931 (Ensley) specifically limits the district court's authority to a determination whether the administrative order entered was arbitrary, unlawful, or unreasonable. The appellate court then, to determine whether the district court properly limited its scope of review, makes the same review of the administrative agency's action.

3. Ordinarily, an issue that has not been raised in the lower court cannot be raised for the first time on appeal.

4. In an appeal from a decision of the district court upholding an order of the Secretary of the Kansas Department of Health and Environment to deny licensure and certification to an intermediate nursing care home, the record is examined and it is *held*: (1) The action of the administrative agency was neither arbitrary, unlawful, nor unreasonable, and (2) the decision of the district court is upheld, all as more particularly related in the opinion.

Appeal from Reno district court; PORTER K. BROWN, judge. Opinion filed February 27, 1982. Affirmed.

Robert L. Taylor, of Hutchinson, argued the cause and was on the brief for the appellant.

Emily E. Cameron, of Kansas Department of Health and Environment, argued the cause and was on the brief for the appellee.

The opinion of the court was delivered by

SCHROEDER, C.J.: Boswell, Inc., d/b/a Reno County Adult Care Home, appeals from the district court decision which affirmed the order of the Secretary of the Kansas Department of Health & Environment (KDHE) denying the facility a license to operate an intermediate nursing care home and denying certification to receive payments under the federal medicaid program. Boswell, Inc., also runs a second adult care facility named Broadacres which is located adjacent to the Reno County Adult Care Home but which operates under a separate license and certification. The licensure and certification of Broadacres is also the subject of appeal before this court. *Boswell, Inc. v. Harkins, d/b/a Broadacres*, 230 Kan. , P.2d (1982) (No. 53,379, this day decided).

The KDHE conducts inspections or field surveys of adult care homes for purposes of state licensure pursuant to authority granted in K.S.A. 39-923 *et seq.* (All statutory references are to the Ensley editions of the Kansas Statutes Annotated.) The department also conducts field surveys under contract with the Kansas Department of Social & Rehabilitation Services for purposes of certifying that federal requirements for participation in the medicaid program, 42 U.S.C.A. § 1396 *et seq.*, have been met. Thus, KDHE field surveys often serve a dual purpose, depending on whether the nursing home has chosen to participate in

the federal medicaid program. In the case at bar, the nursing home had chosen to participate in the federal program, and the two surveys were conducted simultaneously.

Although this appeal involves only the October 24, 1979, application for license and certification by the Reno County Adult Care Home, it is helpful to an understanding of the administrative agency and district court decisions in this case to begin our review of the facts at an earlier point in time. While it is not necessary to this appeal to detail the history of the facility since its inception in 1970, it is important to note that the facility was granted a provisional rather than a full license in November 1978 because of numerous deficiencies. That provisional license expired in March 1979 at which time surveyors from the KDHE made a reinspection. On the basis of their report, the Secretary denied a license application and stated no new provisional license would be issued. Appeal was taken within the administrative agency, but no appeal was taken to the district court from the adverse agency rulings. Instead, on October 24, 1979, the facility submitted a new application for license and certification. On November 15, 1979, the surveyors returned to the facility and filed a reinspection report with the Secretary, citing a number of deficiencies which are set out in greater detail later in this opinion. Based on this report, the Secretary issued an order on January 15, 1980, denying licensure and certification. The facility appealed and extensive testimony was heard by a hearing officer who subsequently filed findings of fact and conclusions of law and recommended the application for license and certification be denied. On May 19, 1980, the Secretary entered an order approving the hearing officer's report and affirming his previous order denying licensure and certification. On May 28, 1980, the facility appealed to the district court pursuant to K.S.A. 39-931

for determination whether the order was arbitrary, unlawful, or unreasonable. The district court found the Secretary's recommendation of denial of certification to the Department of Social & Rehabilitation Services was not unlawful and further found the order issued (1) was not fraudulent, arbitrary, or capricious, (2) was substantially supported by the evidence, and (3) was within the scope of the Secretary's authority. The district court affirmed the order denying both licensure and certification.

The facility duly filed its notice of appeal in the Court of Appeals, and the case was transferred to the Supreme Court on the court's own motion pursuant to K.S.A. 20-3018(c).

The appellant first argues that because the district court received no additional evidence the appellate court occupies the same position as the district court and can evaluate and weigh evidence in deciding the issues presented. We think the appellant has misconstrued the function of this court as well as that of the district court on review of an order by an administrative agency. Neither court has the liberty to reweigh the evidence and substitute its judgment for that of the administrative agency. *Kansas Dept. of Health & Environment v. Banks*, 230 Kan. 169, 171, 630 P.2d 1131 (1981); *Park South Apts. v. Dibbern*, 228 Kan. 784, 789, 620 P.2d 827 (1980); *Kansas State Board of Healing Arts v. Acker*, 228 Kan. 145, 153, 612 P.2d 610 (1980); *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 783, 473 P.2d 72 (1970); *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447, 450, 436 P.2d 828 (1968). Hearings on appeal are "not the equivalent of the initial hearing before the licensing agency which has the responsibility of weighing controverted evidence and arriving at an independent judgment, on the merits, as to entitlement to a license." *Rydd*

v. State Board of Health, 202 Kan. 721, 729, 451 P.2d 239 (1969).

In the case at bar, K.S.A. 39-931 specifically limits the district court's authority to a determination whether the order entered was arbitrary, unlawful, or unreasonable. The appellate court then, to determine whether the district court properly limited its scope of review, makes the same review of the administrative agency's action. *Kansas Dept. of Health & Environment v. Banks*, 230 Kan. at 172; *Park South Apts. v. Dibbern*, 228 Kan. at 789; *U.S.D. No. 461 v. Dice*, 228 Kan. 40, 49, 612 P.2d 1203 (1980); *Gillett v. U.S.D. No. 276*, 227 Kan. 71, 79, 605 P.2d 105 (1980); *Kansas State Board of Healing Arts v. Foote*, 200 Kan. at 451. To this limited extent, it may be said the appellate court occupies the same position as the district court; however, the review by each is limited in the statutorily prescribed manner.

Two considerations, one constitutional and the other a matter of conservation of resources, underlie endorsement of this limited scope of review. On a constitutional level, a broader scope of review would result in judicial usurpation of power delegated by the legislature to the administrative agency and contravention of the separation of powers doctrine. See *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. at 783; *Kansas State Board of Healing Arts v. Foote*, 200 Kan. at 450. Beyond the constitutional consideration, broader review would dilute the advantage of fact-finding by a specialized agency and cast the burden on a district judge who may have no expertise in the particular area. See *Foote*, 200 Kan. at 450-51, 459.

The appellant next raises issues of (1) unlawful delegation of legislative power by both the state legislature and the United States Congress and (2) denial of due

process because duties imposed both as to licensure and certification are not set forth in terms definite enough to serve as a guide to those who have the duty imposed on them. An examination of the petition and brief submitted to the district court reveals these issues were not raised before the district court and consequently are not properly before this court. Ordinarily, an issue cannot be raised for the first time on appeal. See, *e.g.*, *City of Salina v. Jaggers*, 228 Kan. 155, 170, 612 P.2d 618 (1980); *Fleming v. Etherington*, 227 Kan. 795, 802, 610 P.2d 592 (1980); *Malone v. University of Kansas Medical Center*, 220 Kan. 371, 373-74, 552 P.2d 885 (1976); *State v. Estes*, 216 Kan. 382, 385, 532 P.2d 1283 (1975); *Pierce v. Board of County Commissioners*, 200 Kan. 74, 434 P.2d 858 (1967).

As its fourth point, the appellant contends the denial of licensure and certification to the Reno County Adult Care Home was arbitrary, unlawful, and/or unreasonable. Several arguments are advanced to support that contention.

A continuing theme in the transcripts and briefs is that the state has shown no incidents of actual harm to residents. Nowhere in the act do we find a requirement of actual harm. On the contrary, special provision is made for the prevention of harm to residents. After detailing an orderly process for administrative review of a license denial, suspension, or revocation, K.S.A. 39-931 provides:

> "Nothing herein shall be construed to prevent the licensing agency from commencing immediately an action for injunction or other process to restrain or prevent the operation of any licensed home which the licensing agency, upon investigation, shall have found to be operated or maintained in such a manner as to constitute a clear and immediate threat to the lives or health of its residents."

We find it neither arbitrary nor unreasonable to deny or revoke a license before *actual* harm to the residents of a home is demonstrated.

Appellant next argues that it is customary to have some deficiencies and that other facilities have been granted successive provisional licenses in violation of K.S.A. 39-929, which provides in part:

> "A provisional license may be issued to any adult care home, the facilities of which are temporarily unable to conform to *all* the standards, requirements, rules and regulations established under the provisions of this act. . . . A provisional license may be issued to provide time to make necessary corrections for not more than six (6) months. One additional successive six-month provisional license may be granted at the discretion of the licensing agency." (Emphasis added.)

The act recognizes that deficiencies may occur but contemplates that a facility will not operate on a provisional license for more than one year at a time. The provisions of the act apply equally to all nursing home facilities in the state. Assuming, for purposes of this argument only, that the KDHE has erroneously granted provisional licenses in the past, such erroneous action would not prevent enforcement of the statute in this action, *Warburton v. Warkentin*, 185 Kan. 468, 477, 345 P.2d 992 (1959), and would not constitute a denial of equal protection of the law. Past agency error does not abrogate enforcement of the law.

The facility next argues it has corrected deficiencies in the past. The implication seems to be that greater opportunity should be afforded to correct the deficiencies in this instance. We note that, for the six months preceding the application made in October 1979, the facility

was operating on a provisional license the purpose of which was to provide a grace period in which to correct deficiencies. Yet, the hearing officer who filed his report May 7, 1980, found evidence to support numerous violations reported in the November 15, 1979, field survey and found repeated violations of five regulations. K.S.A. 39-931a(b) provides in pertinent part:

> "Pursuant to K.S.A. 39-931, the licensing agency may deny a license to any person and may suspend or revoke the license of any person who: (1) Has willfully or repeatedly violated any provision of law or rules and regulations adopted pursuant to article 9 of chapter 39 of the Kansas Statutes Annotated."

The act clearly does not countenance violations nor envision perpetual grace periods in which to correct them.

Finally, appellant argues the action of the agency was arbitrary essentially because the denial has no reasonable relation to the lawful purpose of the act. An examination of the purpose statement of the act as well as those violations upheld by the hearing officer and the district court should determine the question. On appeal, the facility does not raise an issue challenging the existence of substantial evidence to support the violations.

K.S.A. 39-924 states the purpose of the act as follows:

> "The purpose of this act is the development, establishment, and enforcement of standards (1) for the care, treatment, health, safety, welfare and comfort of individuals in adult care homes licensed by the secretary of health and environment and (2) for the construction, general hygiene, maintenance and operation of said adult care homes, which, in the light of advancing knowledge, will promote safe and adequate accommodation, care and treatment of such individuals in adult care homes."

The hearing officer found and the district court affirmed as substantially supported by the evidence the following violations of K.A.R. 28-39-30 through 28-39-50 adopted pursuant to authority granted in K.S.A. 39-932:

K.A.R. 28-39-33 (A) Policies and procedures need to be revised to fit this facility, and procedures are needed to govern all areas and functions.

K.A.R. 28-39-33 (A) Administrator needs to maintain communication with nursing staff and other departments in regard to new admissions so person is on duty to process admission material when new residents are admitted.

K.A.R. 28-39-33 (J) Policies state that a resident can be discharged for complaining in the facility.

K.A.R. 28-39-33 (K) Committee has reviewed but has not revised policies to fit this facility.

K.A.R. 28-39-34 (B) The total care plan is not a useful tool in management of care. All goals need to be measurable.

K.A.R. 28-39-36 (A) No rehabilitation plan of care is available.

K.A.R. 28-39-38 (A) The activity program needs to be expanded to meet the needs of independent and group activities for each resident.

K.A.R. 28-39-38 (C) Recreation equipment appropriate for residents needs to be obtained.

K.A.R. 28-39-40 (D) Documentation of nurse aide certification is not kept on file for each employee.

K.A.R. 28-39-41 (D) (8) and (19) Hot food (eggs) was served at 112 degrees Farenheit rather

than 140 degrees. Tray identification system was inadequate.

K.A.R. 28-39-41 (F) Final rinse temperature on dishwashing machine is 160 degrees Farenheit rather than 170 degrees as specified by the manufacturer.

K.A.R. 28-39-42 (B) All legend drugs need to be under prescription.

K.A.R. 28-39-42 (E) Drug room needs to be kept free of all personal care items as well as items, clean and soiled, that need to be stored in the utility room. Emergency kit needs to be sealed and dated. Policies and procedures for emergency drugs need to be followed. Policies on self-administration of drugs need to be clarified.

K.A.R. 28-39-43 (A) Closed records need to be organized according to policies and procedures.

K.A.R. 28-39-43 (B) Two of records checked lacked past medical history.

K.A.R. 28-39-43 (D) There is no full-time employee responsible for medical records.

K.A.R. 28-39-44 (A) Policies and procedures for investigating, controlling, and preventing infections are not appropriate for this facility.

K.A.R. 28-39-45 (B) Although an effort was made by the facility to conduct more fire drills after the November 15, 1979, survey, at the time of the survey there was a deficiency.

K.A.R. 28-39-46 (L) The laundry facility does not provide functional separation of clean and soiled linens.

K.A.R. 28-39-48 (I) There was no sign on the toilets for the handicapped.

The violations cited reasonably relate to purposes stated in the act, and denial of a license for these violations could not be termed arbitrary. It would serve no useful purpose to set out in detail the specific violations of 42 C.F.R. § 442.250 *et seq.*, as they relate to certification under the medicaid program. Suffice it to say, they are detailed and keyed to the appropriate sections of the federal regulations.

Review of the record as a whole supports the district court's determination that the order of the Secretary was neither arbitrary, unlawful, nor unreasonable.

Appellant's fifth point on appeal is that, under any reasonable interpretation of K.S.A. 39-931, the facility has "substantially complied" with the requirements, standards, rules, and regulations. Whether there has been substantial compliance depends on whether the purposes of the statute have been met. Although some of the violations set out above could never support a denial of licensure standing on their own, taken as a whole the violations do establish a substantial failure to comply with the regulations requiring policies and procedures to prepare the staff for untoward events, such as disasters or infections, and to plan for the care and activities of the residents.

Finally, appellant contends the procedures followed by the KDHE in determining certification usurp federal law and defeat congressional intent concerning certification under the medicaid program. The record in this case reveals KDHE surveys for licensure and certification may be conducted simultaneously, but separate state and federal regulations are followed in citing violations. The contention is without merit.

The decision of the lower court is affirmed.

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

80 C 449

BOSWELL, INC., D/B/A BROADACRES,
Plaintiff,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Defendant.

MEMORANDUM OPINION

On October 25, 1979, the operators of Broadacres Adult Care Home of Hutchinson applied for a license to operate an intermediate care adult care home, and on October 31, 1979, applied for certification as meeting Medicaid Regulatory Requirements. On November 13 and 14, 1979, the facility was inspected for the purpose of licensure and certification by representatives of the State Department of Health and Environment. These representatives, or surveyors, made recommendations to the Secretary of Health and Environment, and on the 15th day of January, 1980, the Secretary issued an order denying the licensure and certification. The facility appealed, and on May 8, June 2, June 3, June 24 and June 25, 1980, the appeal was heard by Mr. John R. Martin, hearing officer. On July 11, 1980, Mr. Martin filed extensive findings of fact and conclusions of law and recommended that the order denying the application for licensure and for certification be affirmed. On July 18, 1980, Mr. Martin filed amended findings of fact and conclusions of law to correct a typographical error in his original filing of July 11. His recom-

mendation remained the same. On August 25, 1980, the Secretary of Health and Environment entered an order approving the hearing officer's amended report and affirming his previous order of denial of licensure and certification. On September 8, 1980, the facility appealed to this Court, pursuant to K.S.A. 39-931.

The record consists of a transcript of nine hundred and nine pages, a cassette tape and a large box of exhibits.

K.S.A. 39-931 states that I have jurisdiction to affirm, reverse, modify or vacate the order complained of if I am of the opinion that the order was arbitrary, unlawful or unreasonable.

The facility alleges in paragraph five of its notice of appeal that the denial of certification as a Medicaid recipient was done without authority and jurisdiction. The Kansas Administrative Regulations provide that the State Department of Social and Rehabilitation Services may terminate participation in the nursing home program of Medicaid in accordance with K.A.R. 39 [sic] -2-7 and 30-2-8. K.A.R. 30-2-8 provides that the provider's participation may be terminated for either noncompliance with state laws or regulations or for suspension or termination of license to conduct business in Kansas. Thus, the Department of Health and Environment would be authorized to recommend denial of certification based solely upon its denial of licensure. In addition, the hearing examiner found violations of thirteen federal regulations. The denial of certification is therefore, not without authority or jurisdiction.

Is the order of the Secretary denying licensure arbitrary, unlawful or unreasonable? The order is based upon findings by the hearing officer that the facility was in violation of at least sixteen specific regulations and

had repeatedly violated the law or rules and regulations adopted by the Secretary. In accordance with the standard of review set forth in Coggins v. Public Employees Relations Board, 2 K.A.2d 416, as modified by the specific provisions of K.S.A. 39-931, I find that the order of the Secretary denying licensure and certification to appellant, based upon a comparison of the record and the specific findings of fact and conclusions of law filed by the hearing examiner, is:

1. Not fraudulent, arbitrary or capricious;
2. Substantially supported by the evidence; and
3. Within the scope of his authority.

I, therefore, conclude that the order of the Secretary of Health and Environment denying licensure and certification to the Broadacres Adult Care Home should be affirmed.

JOURNAL ENTRY OF JUDGMENT

NOW on this 19th day of May, 1981, judgment is entered as follows:

The Order of the Secretary of Health and Environment denying licensure and certification to the Broadacres Adult Care Home is affirmed.

/s/ Porter K. Brown
Porter K. Brown
District Judge Division One
27th Judicial District of Kansas

(Filed October 28, 1980)

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

80 C 299

BOSWELL, INC., D/B/A RENO COUNTY ADULT CARE HOME,
Plaintiff,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Defendant.

MEMORANDUM OPINION

On October 24, 1979, the operators of the Reno County Adult Care Facility of Hutchinson applied for a license to operate an intermediate care adult care home and for certification as meeting Medicaid Regulatory Requirements. On November 15, 1979, the facility was inspected for the purpose of licensure and certification by representatives of the State Department of Health and Environment. These representatives, or surveyors, made recommendations to the Secretary of Health and Environment, and on January 15, 1980, the Secretary issued an order denying the licensure and certification. The facility appealed, and on March 10, 11, 12, 19 and 26, the appeal was heard by Arthur E. Palmer, hearing officer. On May 7, 1980, Mr. Palmer filed extensive findings of fact and conclusions of law, and recommended that the application of the Reno County Adult Care Facility for licensure and certification be denied. On May 19, 1980, the Secretary entered an order approving the hearing officer's report and affirming his previous order of denial of licensure and certification.

On May 28, 1980, the facility appealed to this Court, pursuant to K.S.A. 39-931.

The record consists of a transcript of seven hundred and forty-seven pages, a cassette tape and approximately fifty pounds of exhibits.

K.S.A. 39-931 states that I have jurisdiction to affirm, reverse, modify or vacate the order complained of if I am of the opinion that the order was arbitrary, unlawful or unreasonable.

The facility first complains that the order of the Secretary denying certification as a Medicaid recipient was done without jurisdiction. K.A.R. provides that the State Department of Social and Rehabilitation Services may terminate participation in the nursing home program of Medicaid in accordance with K.A.R. 39-2-7 and 30-2-8. K.A.R. 30-2-8 provides that the provider's participation may be terminated for either noncompliance with state laws or regulations or for suspension or termination of license to conduct business in Kansas. Thus, the Department of Health and Environment would be authorized to recommend denial of certification based solely upon its denial of licensure. The denial of certification is therefore, not unlawful.

Is the order of the Secretary arbitrary or unreasonable? The order is based upon findings by the hearing officer that the facility was in violation of fourteen specific regulations and had repeatedly violated five regulations. In accordance with the standard of review set forth in Coggins v. Public Employees Relations Board, 2 K.A.2d., 416 as modified by the specific provisions of K.S.A. 39-931, I find that the order of the Secretary, based upon a comparison of the record and the specific findings of fact and conclusions of law filed by the examiner, is:

1. Not fradulent, arbitrary or capricious;
2. Substantially supported by the evidence; and
3. Within the scope of its authority.

I, therefore, conclude that the order of the Secretary denying licensure and certification to the Reno County Adult Care Facility should be affirmed.

/s/ Porter K. Brown
Porter K. Brown
District Judge Division One
27th Judicial District of Kansas

JOURNAL ENTRY OF JUDGMENT

NOW on this 28th day of October, 1980, judgment is entered as follows:

The order of the Secretary of Health and Environment denying licensure and certification to the Reno County Adult Care Facility is affirmed.

/s/ Porter K. Brown
Porter K. Brown
District Judge Division One
27th Judicial District of Kansas

SUPREME COURT OF THE UNITED STATES

No. A-1012

BOSWELL, INC dba RENO COUNTY ADULT CARE HOME,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time within which to docket an appeal in the above-entitled case be, and the same is hereby, extended to and including June 28, 1982.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 25th day of May, 1982.

SUPREME COURT OF THE UNITED STATES

No. A-1010

BOSWELL, INC. dba BROADACRES,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time within which to docket an appeal in the above-entitled case be, and the same is hereby extended to and including June 28, 1982.

/s/ Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 25th day of May, 1982.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 53,379

BOSWELL, INC., d/b/a BROADACRES,
Appellant,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Boswell, Inc., d/b/a Broadacres, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, affirming the decision of the Reno County District Court, entered in this action on the 27th day of February, 1982.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

By /s/ Robert L. Taylor
Robert L. Taylor
Attorney for Appellant

CERTIFICATE OF SERVICE

Robert L. Taylor, Attorney for Appellant, states that he deposited a copy of the foregoing Notice of Appeal to the Supreme Court of the United States in the United States mail, postage prepaid, addressed to Ms. Emily Cameron, Attorney, Kansas Department of Health and Environment, Forbes Field, Topeka, Kansas 66620 on this 26th day of March, 1982.

By /s/ Robert L. Taylor
Robert L. Taylor
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 52,737

BOSWELL, INC., d/b/a RENO COUNTY ADULT CARE HOME,
Appellant,

vs.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Boswell, Inc., d/b/a Reno County Adult Care Home, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Kansas, affirming the decision of the Reno County District Court, entered in this action on the 27th day of February, 1982.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

By /s/ Robert L. Taylor
Robert L. Taylor
Attorney for Appellant

CERTIFICATE OF SERVICE

Robert L. Taylor, Attorney for Appellant, states that he deposited a copy of the foregoing Notice of Appeal to the Supreme Court of the United States in the United States mail, postage prepaid, addressed to Ms. Emily Cameron, Attorney, Kansas Department of Health and Environment, Forbes Field, Topeka, Kansas 66620 on this 26th day of March, 1982.

By /s/ Robert L. Taylor
Robert L. Taylor
Attorney for Appellant

No. 81-2383

Office - Supreme Court, U.S.
FILED
JUL 30 1982
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

BOSWELL, INC. d/b/a BROADACRES,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee,

AND

BOSWELL, INC. d/b/a RENO COUNTY ADULT CARE HOME,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO DISMISS

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No. 81-2383

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

BOSWELL, INC. d/b/a BROADACRES,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee,

AND

BOSWELL, INC. d/b/a RENO COUNTY ADULT CARE HOME,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF KANSAS

MOTION TO DISMISS

Appellee in the above entitled case moves to dismiss the appeal on the follow-

ing grounds:

1. The federal question sought to be reviewed in Boswell, Inc. d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment, 230 Kan. 610, 613, ... P.2d .... (1982), (Appellant's Jurisdictional Statement A9-A19) were neither properly raised nor expressly passed on by the courts of Kansas.
2. The appeal does not present a substantial federal question.

OPINIONS BELOW

In Appendix A, pages A1-A88 of this brief, appear the administrative opinions of the Kansas Department of Health and Environment which were subsequently appealed to the district court, affirmed by the Kansas Supreme Court, and are now

before this Court.

STATUTES AND REGULATIONS INVOLVED

Some provisions of Kansas and United States Constitutional issues involved in this case are set forth in Appellant's Jurisdictional Statement at pages 3 through 7. In this Appendix, at pages A89-A118, is found a copy of K.A.R. 28-39-33 (1978) and a copy of 42 C.F.R. § 442.251 (1979).

STATEMENT OF CASE

This is an appeal from two separate Kansas Supreme Court cases involving different nursing homes but the same parties. Counsel for appellant has joined these cases together in this appeal. Reno County, Kansas, owns both homes and leased them to Boswell, Inc. This lease expired

July 31, 1981.[1/]

Both homes were given the opportunity to correct numerous deficiencies, counseled on how to correct the deficiencies, but the operators failed to come into substantial compliance with nursing home statutes and regulations. The state has been involved in litigation with these homes since 1978. The administrative orders subject to this appeal were issued in 1980.

A. Reno County Adult Care Home

The Reno County Home was given a provisional license in November, 1978. On May 3, 1979, licensure and certification were denied. The facility had been given

[1/] This fact is not in the record. However, it is an exhibit in another case entitled Board of County Commissioners of Reno County, Kansas v. Boswell, Inc., No. 81-53,027 (Kan. App. 2d Apr. 22, 1982) (rev. denied Kansas Supreme Court June 28, 1982) (Record at T.12, Def. Exhibit 2).

eight months to comply and it had failed to do so. A hearing was held and the Order of Denial was upheld. The facility was given another opportunity to apply for a license, based on assurance of counsel, Robert Taylor, that the facility was in compliance. However, after resurvey, the facility was found still to be in noncompliance. Thus the license and certification were denied again. This most recent denial is the subject of this appeal.

After the license denial was upheld in the administrative hearing before the Kansas Department of Health and Environment, the department filed for medical receivership of this home pursuant to K.S.A. (1980 Supp.) 39-954. Receivership was granted and has subsequently been terminated. The County of Reno has leased the home to new operators who are cur-

rently operating the facility.[2/]

After the license denial by the state and during this same period the County of Reno filed an ejectment suit in Reno County District Court which has recently been affirmed by the Kansas Court of Appeals.[3/]

B. Broadacres Adult Care Home

Broadacres was denied a state license in October, 1978, based on a September

[2/] The facts in this paragraph are not in evidence. The information, however, is contained in In the Matter of the Appointment of a Receiver for the Reno County Adult Care Home Facility, an Adult Care Home of Hutchinson, Kansas, No. 80 C 79 (Reno County District Court) (This case, when it became a final judgment in District Court, was not appealed to the Kansas Court of Appeals).

[3/] This fact is not in evidence in this case. Board of County Commissioners of Reno County, Kansas v. Boswell, Inc., No. 81-53,027 (Kan. App. 2d April 22, 1982) (rev. denied Kansas Supreme Court June 28, 1982).

survey. Medicaid certification was denied in October, 1978. Hearings were held on the denial order and certification denial was upheld; however, the facility was given a ninety-day provisional license on the condition that the facility accept the guidance and recommendations of the state in correcting deficiencies.

In July, 1979, the reinspection showed the facility was still in non-compliance and the application for license was denied. However, no appeal was made to the State District Court on this denial. Based on assurances of counsel, Robert Taylor, the facility was allowed to apply for state licensure again. The facility was resurveyed and found to be in substantial noncompliance and this is the denial that is the subject of the appeal before the Court today.

The facility was closed on January 2, 1980, by order of the Kansas Department of Health and Environment. This order was not appealed to Kansas District Court. Boswell, Inc.'s lease was terminated in this facility at the same time it was terminated on the Reno County Adult Care Facility.

Federal constitutional issues were only raised in the Broadacres case in district court. Thus the Supreme Court of Kansas refused to review the constitutional issues in the Reno County case because they were not raised at the district court.

FEDERAL QUESTION NOT PROPERLY RAISED IN STATE COURT IN THE RENO COUNTY CASE

Jurisdiction of the Supreme Court to reexamine final judgment of state court

can arise only if record as a whole shows either expressly or by clear indication that the federal claims were adequately presented in the state system. Supreme Court Rule 16.1(b); Cardinale v. Louisiana, 394 U.S. 437 (1969). This was not done in the Boswell, Inc. d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment, 230 Kan. 610, 613, ... P.2d .... (1982); (Appellant's Jurisdictional Statement A9-A19). There the court held:

> The appellant next raises issues of (1) unlawful delegation of legislative power by both the state legislature and the United States Congress and (2) denial of due process because duties imposed both as to licensure and certification are not set forth in terms definite enough to serve as a guide to those who have the duty imposed on them. An examination of the petition and brief submitted to the district court reveals these issues were not raised before the district court and consequently are not properly before this court. Ordinarily, an issue can not be raised for the first time on appeal.

> See, e.g., City of Salina v. Jaggers, 228 Kan. 155, 170, 612 P.2d 618 (1980); Fleming v. Etherington, 227 Kan. 795, 802, 610 P.2d 592 (1980); Malone v. University of Kansas Medical Center, 220 Kan. 371, 373-74, 552 P.2d 885 (1976); State v. Estes, 216 Kan. 382, 385, 532 P.2d 1283 (1975); Pierce v. Board of County Commissioners, 200 Kan. 74, 434 P.2d 858 (1967). (230 Kan. at 613, ... P2.d .... (1982) (Appellant's Jurisdictional Statement, pages A13, A14)

Appellant's failure to raise constitutional issues at district court denied the state court the opportunity to rule on the issues. As a consequence, the record is devoid of any evidence on this point in the Reno County case. These practical policy reasons, as well as appellant's failure to comply with the jurisdictional requirements of 28 U.S.C.S. § 1257(2) (Law. Co-op. 1977), justify dismissal of the appeal in regard to the Reno County Adult Care Home.

THE FEDERAL QUESTIONS ARE UNSUBSTANTIAL

Appellant has the burden of pleading the defects in the statute and regulations in the original pleading. Smaldone v. United States, 458 F. Supp. 1000 (D.C. Kan. 1978); 73 C.J.S. Public Administrative Bodies and Procedures, § 104(C) nn. 11 & 12. In this case the only K.A.R. specifically challenged was K.A.R. 28-39-33(A) and (C) (1978) as being unconstitutionally vague and overbroad. The only Kansas statute specifically challenged as being vague was K.S.A. (1980 Supp.) 39-931. No federal regulations were specifically challenged.

Appellant has cited cases dealing with state regulation of business and industry. These cases do not apply to this proceeding. This case deals with the

administration and regulation of state Medical Assistance Program for the indigent and the exercise of state police power in the licensure and regulation of nursing homes for the care of the aged and the infirm. Dandridge v. Williams, 397 U.S. 471, 484-487, (1970); 51 Am Jur 2d Licenses and Permits § 53 n. 1.

This is a civil proceeding, not a criminal matter. The courts use different standards for determining vagueness in civil cases. Arnett v. Kennedy, 416 U.S. 134 (1974).

Appellant suggests that such language as "acceptable policies and procedures" and "support sound resident care and personnel practices" are constitutionally vague. See: The Association of American Phy. And Sur. v. Weinberger, 395 F. Supp. 125, 138, affirmed 425 U.S. 975 (1975); see also

Augustin v. Quern, 461 F. Supp. 441 (1978).

The Kansas Supreme Court in regard to vagueness claims by appellants held:

> ... The few phrases or words specifically pointed out by the appellant have well understood common meanings and are neither vague nor indefinite. Boswell, Inc. d/b/a Broadacres v. Joseph F. Harkins, Secretary, Kansas Department of Health and Environment, 230 Kan. 738, 741, ... P.2d .... (1982) (Appellant's Jurisdictional Statement A6).

The record indicates that if and when a regulation of the Kansas Department of Health and Environment is unclear, the department provides consultation on what is necessary for compliance and that Boswell, Inc., received such consultation each time a survey was conducted. Seagram & Sons v. Hostetter, 384 U.S. 35, 49 rehearing denied 384 U.S. 967 (1966).

The violation asserted in K.A.R. 28-39-33(A)(1) (1978) is more explicitly set

forth at K.A.R. 28-39-33(A)(2)(3)(9)(10) (1978) and K.A.R. 28-39-33(J)(1)(8)(9) (1978). The violations asserted in K.A.R. 28-39-33(C)(1) (1978) are more explicitly set forth in K.A.R. 28-39-33(C)(2)(3)(4)(5)(6)(7) and (8) (1978). Furthermore, even if K.A.R. 28-39-33(A)(1) and (C)(1) (1978) were struck, this would not affect the outcome of this case since the violations asserted in K.A.R. 28-39-33(A)(1) and (C)(1) (1978) are repeated elsewhere in the administrative order with regulations using more specific language.

Appellant has no testimony in the record indicating he was unable to determine what was needed to comply. Instead the record is replete with plans of correction submitted by Boswell, Inc., informing the state of what they intended to do to comply. The state accepted

plans of correction, however, upon resurvey found that the corrections had not been completed. Appellant's contention that his client suffered harm because of his inability to comprehend the regulations set forth in K.A.R. 28-39-33 (1978) is totally devoid of merit.

Appellant's contention that K.S.A. (1980 Supp.) 39-931 is vague because it uses the standard of substantial compliance is totally without merit and lacks foundation in law. Seagram & Sons v. Hostetter, 384 U.S. 35, rehearing denied 384 U.S. 967 (1966); Cf. Opp. Cotton Mills v. Administrator, 312 U.S. 126, 142-46(1941); Bowles v. Willingham, 321 U.S. 503, 512-16 (1944).

The Due Process Clause prohibits only those classifications within the federal social welfare program that are "patently arbitrary classification[s], utterly

lacking in rational justification." Flemming v. Nestor, 363 U.S. 603, 611. (1960). Due process requirements are fulfilled in regulations which are reasonably related to this subject and are adopted in the interest of the community. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

Here, federal Medicaid regulation 42 C.F.R. § 442.251 (1979) requires certification can not be granted if the facility lacks a state license. This requirement is clearly not vague or outside the boundaries of permissible legislation.

The statute authorizing the promulgation of 42 C.F.R. § 442.251 (1979) is 42 U.S.C.S. § 1302 (1973). This statute has not been challenged by appellant and clearly gives Health and Human Services (formerly Health, Education, and Welfare)

authority to promulgate 42 C.F.R. § 442. 251 (1979). Appellant's argument that the Medicaid certification orders in the two cases under review are constitutionally infirm is clearly without merit.

In addition, the district court in both cases ruled the Medicaid certification denial could be based solely on K.A.R. 30-2-7 in effect as temporary regulation August 8, 1979, and K.A.R. 30-2-8 in effect as temporary regulation August 8, 1979. Boswell, Inc. d/b/a Broadacres v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment (Reno County District Court May 19, 1981), (Appellant's Jurisdictional Statement page A21), Boswell, Inc. d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment (Reno County District Court

October 28, 1980) (Appellant's Jurisdictional Statement page A24). Thus, there is no need to review whether federal Medicaid statutes and regulations are constitutionally infirm for whatever reason.

Appellant also contended there was unlawful delegation of legislative authority pursuant to K.S.A. 39-932 (1973). Appellant contended the last sentence of K.S.A. 39-932 (1973) constituted an unlawful delegation of authority. Even if that were true, the department has not established such a system and the appellant has not lost his license under such a system. In addition, the Kansas Department of Health and Environment has authority to promulgate rules and regulations pursuant to K.S.A. (1980 Supp.) 39-950.

Furthermore, if the last sentence of K.S.A. 39-932 (1973) is void for being unconstitutional delegation of authority,

that sentence alone could be struck leaving the statute intact. United States v. Jackson, 390 U.S. 570 (1968).

In addition, appellant at no time in state court specifically alleged that K.S.A. 39-932 (1973) was unconstitutional based on federal law.

Appellant has failed to allege at any time in his pleadings why he believes 42 U.S.C.S. § 1396a (1980) to be an unlawful delegation of authority and thus lacks standing to have the issue considered by this Court. 458 F. Supp. 1000. In addition, the decision of the State Supreme Court in regard to Medicaid certification in both cases before this Court can be sustained by utilizing 42 C.F.R. § 442.251 (1979) which was promulgated based on 42 U.S.C. § 1302 (1973). Thus there is no need in this case to consider the constitutionality of 42 U.S.C. § 1396a (1980).

Appellant's equal protection argument is without merit. The Supreme Court held in Boswell, Inc. d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment, 230 Kan. 610, 614, ... P.2d .... (1982):

> The act recognizes that deficiencies may occur but contemplates that a facility will not operate on a provisional license for more than one year at a time. The provisions of the act equally apply to all the nursing home facilities in the state. Assuming for purposes of this argument only, that the KDHE has erroneously granted provisional licenses in the past, such erroneous action would not prevent enforcement of the statute in this act, Warburton v. Warkentin, 185 Kan. 468, 477, 345 P.2d 992 (1959), and would not constitute a denial of equal protection of the law. Past agency error does not abrogate enforcement of the law. (Appellant's Jurisdictional Statement, page A15)

In addition, the State Supreme Court found in Boswell, Inc. d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health

and Environment, 230 Kan. 610, 614, 615, ... P.2d .... (1982):

> ... We note that, for the six months preceding the application made in October, 1979, facility was operating on a provisional license the purpose of which was to provide a grace period in which to correct deficiencies. Yet, the hearing officer who filed his report May 7, 1980, found evidence to support numerous violations reported in the November 15, 1979, field survey and found repeated violations of five regulations. K.S.A. 39-931a (b) provides in pertinent part:
>
> > "Pursuant to K.S.A. 39-931, the licensing agency may deny a license to any person and may suspend or revoke the license of any person who: (1) Has willfully or repeatedly violated any provision of law or rules and regulations adopted pursuant to Article 9 of Chapter 39 of the Kansas Statutes Annotated."
>
> The act clearly does not countenance violations nor envision perpetual grace periods in which to correct them. (Appellant's Jurisdictional Statement, pages A15-A16).

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

If this Court treats appellant's request as a Petition for Writ of Certiorari only federal questions passed upon by the state supreme court can be considered by this Court. Wilson v. Cook, 327 U.S. 474 (1946). In this case, as previously stated, only in the Broadacres case were the constitutional issues raised at the lower court and ruled on by the state supreme court. The constitutional issues must be raised properly before the U.S. Supreme Court can rule on them. Webb v. Webb, 101 S. Ct. 1889 (1981). Stembridge v. Georgia, 343 U.S. 541, 547 (1952).

Upon examination of Supreme Court Rule 17, it is clear that appellant's Jurisdictional Statement does not encompass any of the reasons set forth in Rule

17 for granting certiorari. The Kansas Administrative Regulations in effect at the time of denial of license have been repealed as of January 7, 1982. There are no special circumstances that warrant consideration of these repealed regulations by the U. S. Supreme Court. In District of Columbia v. Sweeney, 310 U.S. 631 (1940), the Court ... "denied [Petitioner's Writ of Certiorari] in view of the fact that the tax is laid under a statute which has been repealed and the question is therefore not of public importance." The issues under review in this case do not deal with issues that are in conflict with decisions of other courts and are based solely on Kansas law. Neither does the case deal with an important question of federal law which has not been resolved and should be settled by this Court. Nor has there been a showing

by appellant that the Kansas Supreme Court in writing its judgment so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of the Supreme Court's supervisory power.

Another reason for not hearing the request is that appellant could not be returned to the status quo. His lease has expired and another party is operating the nursing home on the premises. Furthermore, as was set forth in the section on lack of substantial federal question, appellant's constitutional contentions are meritless.

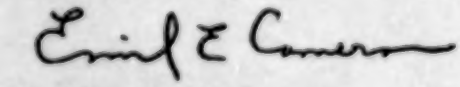
CONCLUSION

For the foregoing reasons, I respectfully submit that the questions presented by appellant are clearly insubstantial and that the case should be dismissed.

Treating the appeal papers as a petition for a writ of certiorari should be denied because there are no special and important reasons for the case to be heard.

At the very least, the Court lacks jurisdiction to review Boswell, Inc., d/b/a Reno County Adult Care Home v. Joseph F. Harkins, Secretary of the Kansas Department of Health and Environment, 230 Kan. 610 .... P.2d .... (1982) (Appellant's Jurisdictional Brief pages A9-A19) because the federal question was not timely or properly raised at the lower court.

Respectfully submitted,



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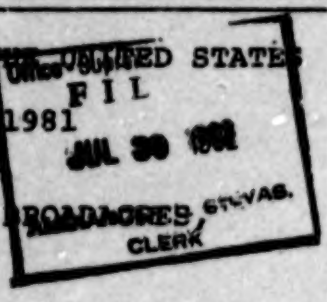
July 23, 1982

No. 81-2383

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981



BOSWELL, INC. d/b/a BROADMOORE,
Appellant,

v.

JOSEPH F. HARKINS, SECRETARY, KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT,
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ON APPEAL FROM THE SUPREME COURT OF KANSAS

APPENDIX TO
MOTION TO DISMISS

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APPENDIX

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In The Matter Of The Licensure
And Certification Of The
Broadacres Adult Care Home 80-1
Of Hutchinson, Kansas

DENIAL ORDER FOR LICENSURE AND CERTIFICATION

Now on this 7th day of January, 1980, the Secretary of the Kansas Department of Health and Environment, Joseph F. Harkins, considers the application filed on October 25, 1979, by the operators of the subject facility for a license to operate an intermediate care adult care home and also their application for certification as meeting Medicaid Regulatory Requirements filed on or about October 31, 1979.

The Secretary finds, upon further examination of his files, that the facility was inspected, or surveyed, on November 13 and 14, 1979, for purposes of licensure and certification; the results of that inspection were provided to the administrator of the facility during a so-called "exit interview" on November 21, 1979. A report of that inspection has been submitted to the Secretary's office and is before the Secretary.

The Secretary finds that the application for licensure of the Broadacres Adult Care Home should be denied for the reason that the facility is in substantial failure to comply with the requirements, standards and regulations promulgated by the Secretary. The Secretary finds that the applicant is not in substantial compliance with the following state licensure regulations:

1. K.A.R. 28-39-31 Licensing procedure; (F) Modification of structure. Letter of approval for change of physical therapy room, clean utility room and soiled utility room is not on file in facility.
2. K.A.R. 28-39-33 Administration; (A) Management. Policies and procedures are available but do not always fit this particular facility and cannot be used as written.
3. K.A.R. 28-39-33 Same; (C) Personnel Policies and Procedures. Some of the job descriptions need to be revised to fit this facility.
4. K.A.R. 28-39-33 Same; (D) Staff development. Orientation for all new employees besides nursing personnel needs to be done and

kept on file.

5. K.A.R. 28-39-33 Same; (D) Staff development. Personnel records need to be kept current as to placement of employees, orientation to other areas when employee changed positions, termination and employment dates.

6. K.A.R. 28-39-33 Same; (E) Use of outside resources and (F) Admission policy. Mentally retarded resident is retained in facility and appropriate program is not [illegible].

7. K.A.R. 28-39-33 Same; (K) Development and review of resident care policies. Resident care policies have not been reviewed and revised by the professional advisory board to fit this facility. Person responsible in

writing such policies is not qualified.

8. K.A.R. 28-39-33 Same; (J) Resident rights. Window curtains do not provide privacy at all times.

9. K.A.R. 28-39-36 Rehabilitative services; (B) Provision of services. Occupational Therapist's contract states she will be in facility two or three hours each two months--has only provided one hour every two months.

10. K.A.R. 28-39-38 Activities services; (A) Programming. Activity Plan and Program needs to be expanded to meet the needs and interests of each resident.

11. K.A.R. 28-39-38 Same; (A) Same; Activity plan of care is not developed as a useful tool for resident care.

12. K.A.R. 28-39-39 Physician services; (C) Resident supervision by physician and K.A.R. 28-39-42 Pharmaceutical services (D) Review. One resident record, checked, lacked physician's progress note and one lacked physician's review of medications every 60 days. (Corrected on November 21, 1979)

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14. K.A.R. 28-39-40 Same; (D) Nursing home aide qualifications. All nurse aides are not qualified by training and copies of certificates are not always on file to verify training.

15. K.A.R. 28-39-41 Dietetic; (B) Nutrition and Menu Planning. Tray identification system needs to be left on trays (therapeutic), to insure diet is taken as ordered.

16. K.A.R. 28-39-41 Same; (B) Same. Food supplies are not always on hand to serve diets as ordered. Equal substitution for caloric and nutritional content needs to be made.

17. K.A.R. 28-39-41 Same; (B) Same. Standardized recipes need to be used for number of residents in the facility.

18. K.A.R. 28-39-41 Same; (D) Preparation and service. Ice machine needs to be repaired or replaced. Rinse faucet at dishwasher needs to be repaired or replaced. Toaster needs to be repaired or

replaced. (Repaired as of November 21, 1979.)

19. K.A.R. 28-39-41 Same; (D) Same. Steam table needs to keep hot food at 140°F.

20. K.A.R. 28-39-42 Pharmaceutical services. a. Stop order policy does not specify narcotic stoppage.

b. Pharmaceutical policies and procedures need to be revised to fit facility.

c. All prescription drugs in facility need to be properly labeled (insulin is an example).

d. Soiled and illegible labels need to be returned to pharmacy for relabeling.

e. Medication cups need to be kept clean and nondrug room items need to be stored in clean and

soiled utility rooms.

f. Emergency drug box needs to be sealed and dated and handled in accordance with K.S.A. 65-1630.

g. Nonsterile disposable supplies need to be removed from drug room and destroyed.

21. K.A.R. 28-39-42 Same; (E) Administration of medications. Drugs need to be properly stored. Each resident's stored separately. Drug room needs to be kept clean and free from items to be stored in utility rooms.

22. K.A.R. 28-39-43 Resident record; (A) Record keeping. Discharge records are not organized.

23. K.A.R. 28-39-43 Same; (D) Staffing. Verification that medical records

designee is a full-time employee is not available.

24. K.A.R. 28-39-44 Infection control and sanitation; (A) Infection control committee. Isolation policies and procedures need to be revised to fit this facility.

25. K.A.R. 28-39-44 Same; (F) Maintenance of equipment and building. Drinking fountain water pressure is not adequate and dripping faucet in resident's room needs repaired.

26. K.A.R. 28-39-44 Same; (B) Aseptic and isolation techniques. Isolation equipment is not available according to procedures to carry out isolation.

The exit interview for the following deficiencies was held on December 11,

1979. These deficiencies pertain to infection control and sanitation. The Secretary finds that the applicant is not in compliance with the additional following state licensure regulations:

27. K.A.R. 28-39-44 Infection control and sanitation; (C) Housekeeping. Laundry; no exhaust fan in soiled linen room.

28. K.A.R. 28-39-44 Same; (F) Maintenance of equipment and building. Dietary Department; the ice machine needed to be repaired or replaced.

29. K.A.R. 28-39-44 Same; (F) Same. Wall joint board in dining room missing.

30. K.A.R. 28-39-44 Same; (F) Same. B-Hall; walls need repairing; shower needs cleaning. Room 26, faucet broken.

The Secretary finds that the applicant should be denied certification for the reason that the facility is not in compliance with the following federal regulations:

1. 42 C.F.R. 442.251 State Licensure. Facility is not currently licensed.
2. 42 C.F.R. 442.302 Staffing. All nurse aides are not qualified by training and copies of certificates are not in personnel files.
3. 42 C.F.R. 442.303 and 42 C.F.R. 442.305 Administration and Policies and Procedures. Policies and procedures need to be revised to fit actual facility in accordance with K.A.R. 28-39-33(K).
4. 42 C.F.R. 442.306 Written Policy and Procedure Admission. Mentally retarded resident is retained in

facility and appropriate program is not provided.

5. 42 C.F.R. 442.314(a) Staff Training Program. Orientation of all new employees, besides nursing personnel, needs to be done and kept on file. Job descriptions need to be revised to fit this facility.

6. 42 C.F.R. 442.314(c) Same. Personnel records need to be kept current as to placement of employees, orientation to other areas when employees change position, and termination and employment dates.

7. 42 C.F.R. 442.315 Health and Safety Laws. Facility does not have letter of approval for change of physical therapy area and utility (clean and soiled) rooms.

8. 42 C.F.R. 442.317 Arrangements with Outside Resources. Occupa-

tional Therapist's contract states she will be in the facility two to three hours each two months--she has provided only one hour every two months.

9. 42 C.F.R. 442.318 Resident Records System. Closed records need to be organized.

10. 42 C.F.R. 442.331(b) Sanitary Conditions. Ice machine needs repaired or replaced. Rinse faucet at dishwasher needs to be repaired or replaced. Steam table needs to keep hot food at 140°F.

11. 42 C.F.R. 442.332(a) Menu Planning and Supervision. Standardized menus need to be used for number of residents in this facility.

Tray identification system needs

to be left on trays to point of return on therapeutic diets to insure diets are taken.

12. 42 C.F.R. 442.333 Pharmacist. Pharmaceutical policies and procedures need to be revised to fit facility and implemented. All prescription drugs in facility need to be properly labeled. Soiled and illegible labels need to be returned to pharmacy for relabeling.

Medication cups need to be kept clean and nondrug items need to be stored in clean and soiled utility rooms. Emergency drug box needs to be sealed and dated and handled in accordance with K.S.A. 66-1630.

Nonsterile disposable supplies need to be removed from drug

room and destroyed.

13. 42 C.F.R. 442.339 Health Service Supervisor. Documentation does not show that Health Service Supervisor is working full time.

14. 42 C.F.R. 442.345(a) Activities Program. A plan for activity needs to be expanded to meet the needs and interests of each resident.

15. 42 C.F.R. 442.345(c) Same. Activity Plan has not been developed into a useful tool for resident care.

The Secretary further finds that the subject licensure application should be denied, in addition to the grounds above stated, because the applicant has repeatedly violated provisions of law or rules and regulations adopted by the Secretary pursuant to Article 9 of Chapter 39 of

the Kansas Statutes Annotated, within the meaning and scope of K.S.A. 1979 Supp. 39-931a. The violations which have been observed in the subject facility are as follows:

	Regulation Violated	Dates of Repeated Violation
1.	K.A.R. 28-39-33 Administration	September 28, 1978 October 13, 1978 May 24, 1979 July 12, 1979 November 13, 1979
2.	K.A.R. 28-39-34 Resident Services	October 13, 1978 July 12, 1979
3.	K.A.R. 28-39-35 Diagnostic and Dental Services	September 28, 1978 October 13, 1978
4.	K.A.R. 28-39-36 Rehabilitative Services	September 28, 1978 October 13, 1978 May 24, 1979

		July 12, 1979
5.	K.A.R. 28-39-37	September 28, 1978
	Social Services	October 13, 1978
		May 24, 1979
		July 12, 1979
		November 13, 1979
6.	K.A.R. 28-39-38	September 28, 1978
	Activities Ser-	October 13, 1978
	vices	May 24, 1979
		July 12, 1979
		November 13, 1979
7.	K.A.R. 28-39-39	May 24, 1979
	Physician Ser-	November 13, 1979
	vices	
8.	K.A.R. 28-39-40	September 28, 1978
	Health Services	May 24, 1979
		July 12, 1979
		October 13, 1979
		November 13, 1979

9.	K.A.R. 28-39-41 Dietetic Services	September 28, 1978 October 13, 1978 May 24, 1979 November 13, 1979
10.	K.A.R. 28-39-42 Pharmaceutical Services	September 28, 1978 October 13, 1978 May 24, 1979 July 12, 1979 November 13, 1979
11.	K.A.R. 28-39-43 Resident Record	October 13, 1978 May 24, 1979 July 12, 1979 November 13, 1979
12.	K.A.R. 28-39-44 Infection Control and Sanitation	September 28, 1978 May 24, 1979 July 12, 1979 November 13, 1979
13.	K.A.R. 28-39-45 Disaster Preparedness	September 25, 1978 September 28, 1978 July 12, 1979

It is therefore by the Secretary ordered that the subject application for licensure and certification for the Broadacres Adult Care Home be denied.

IT IS BY THE SECRETARY SO ORDERED.

Dated this 15th day of January,

/s/ Joseph F. Harkins

Joseph F. Harkins, Secretary
Kansas Department of Health
and Environment

(Omitting Certificate of Mailing)

BEFORE THE KANSAS DEPARTMENT OF

HEALTH AND ENVIRONMENT

In The Matter Of The Licensure
And Certification Of
Broadacres Adult Care Home, Case No. 80-1
Hutchinson, Kansas

ORDER AFFIRMING SECRETARY'S DENIAL
ORDER FOR LICENSURE AND CERTIFICATION

On this 25th day of August, 1980, the Secretary of the Kansas Department of Health and Environment, Joseph F. Harkins, reviews the report of Hearing Officer John R. Martin in the above entitled matter. The Administrative hearing was held on April 16, 1980, May 8, 1980, June 2, 24, 1980, on the appeal from the Secretary's order of denial for licensure and certification which was issued on January 7, 1980.

The Secretary has before him the written findings and recommendation as well as the amended findings of fact and conclusions of law and recommendations that were submitted to him by Hearing Officer John R. Martin as well as the exhibits introduced at the administrative hearing and Mr. Taylor's written comments on the hearing officer's report. The secretary hereby approves the amended findings of fact, conclusions of law and recommendations submitted by the hearing officer, which are attached hereto and made a part of this order. The Secretary adopts the amended findings of fact, conclusions of law and recommendations of the hearing officer as his own. The Secretary finds that the grounds for the subject order of denial were and are correct and therefore, the Secretary finds that

his order of denial should be affirmed and the appeal of Broadacres Adult Care Home of Hutchinson, Kansas, be denied. The Secretary finds that the allegation of bias against Hearing Officer John R. Martin is unsubstantiated and without merit.

It is the Secretary's understanding that Broadacres Adult Care Home is not presently being used as an adult care home and the Secretary is ordering that it shall not be used as an adult care home until it has been licensed pursuant to K.S.A. 39-923, et seq.

Further, the Secretary acknowledges receipt of the "Facility's Written Comments To Hearing Officer's Report". The Secretary has reviewed said comments and given due consideration to them. In determining whether the facility was in substantial compliance with statutes and regulations

for adult care homes is not a numerical determination as to the number of deficiencies, but is a discretionary decision for the Secretary to be made from the seriousness of the deficiencies and the effect the deficiencies have on the overall patient care.

The applicant shall have 15 days after receipt of a copy of this order if she so desires to appeal the Secretary's decision to District Court.

IT IS THEREFORE ORDERED BY THE SECRETARY that his order of denial for licensure and certification dated January 7, 1980, is hereby affirmed and that this facility shall not be used as an adult care facility until after it is properly licensed.

This order entered and made effective this 25th day of August, 1980.

/s/ Joseph F. Harkins

Joseph F. Harkins

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In the Matter of the Licensure and Certification of the Broadacres Adult Care Home of Hutchinson, Kansas	)))))	Case No. 80-1

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

This matter is before the Hearing Officer upon an appeal by the Broadacres Adult Care Home of Hutchinson, Kansas, from an Order by the Secretary of the Kansas Department of Health and Environment, dated January 7, 1980, denying its application for a license to operate an intermediate care facility and an application for certification as meeting Medicare regulatory requirements.

A hearing has been held upon the appeal. The facility was represented by Robert Taylor; the Department, by Robert Corbett. In the Order of Denial, the Secretary found that the facility was not in compliance with a number of regulatory requirements.

In deficiency number one, citing K.A.R. 28-39-31(f), the Department alleges that the facility lacked a letter of approval for change of a physical therapy room, a clean utility room and a soiled utility room. Mrs. Hanson, who surveyed the facility, testified that these facilities were located in an unlicensed portion of the building which was formerly occupied by an apartment provided for the administrator. She further testified that if approval had been requested, it might well have been denied on the ground that it was too distant from residents' quarters,

and lacked proper equipment. The testimony was undisputed that these changes had not been approved by the licensing agency, and it is my recommendation that this deficiency constitutes substantial noncompliance with the cited regulation.

The second alleged deficiency, cited under K.A.R. 28-39-33(A) alleges that the policies and procedures are available, but do not always fit this particular facility and cannot be used as written. The referenced regulation requires that the facility adopt and enforce acceptable policies and procedures. Mrs. Hanson cited a number of instances in which either policies or procedures were inadequate. She cited a conflicting policy on self-medication, one portion of which prohibited and another portion of which permitted it. One policy called for double water soluble bags to be available from

central supply for isolation of linents. The policy was inappropriate, she testified, because it was one adapted for a large hospital, and in addition, was not being carried out because no such bags were available. Certain policies were unacceptably vague, referring, e.g., to an "appropriate" solution without giving guidance as to what solutions were to be used. She testified that there were no policies and procedures for activity programs. The housekeeping policy provided, in one instance, that nurses' aides on the eleven-to-seven shift would clean bathrooms - a policy which constituted a serious breach of infection control. She testified that pharmaceutical policies needed to be revised to fit the facility, and to be implemented. That policy provided, in part, for a unit dosage plan, which was not in use at the

facility. The resident care policy was inconsistent, she stated, providing on the one hand that the administrator was responsible, and elsewhere that the resident care director was responsible therefor. The testimony of the Department fully supports the finding of a substantial violation of the referenced regulation in regard to deficiency number two.

Regarding deficiency number three, it is alleged that some job descriptions needed to be revised to fit the facility, with specific reference to the Director of Nurses, Resident Care Coordinator, and Resident Health Services Director. The nature of the needed clarification is not clear from the record, and I cannot find substantial noncompliance on this point.

In deficiency number four, citing K.A.R. 28-39-33(D), the Department alleges

that the orientation for all new employees, besides nursing personnel, needed to be provided, and records thereof, to be kept on file. Mrs. Hanson cited eight employees whose files lacked any record of orientation in the departments to which they were assigned. The record supports a finding of substantial noncompliance on this deficiency.

The fifth deficiency likewise relates to K.S.A. 38-39-33(D), citing the failure of the facility to keep personnel records current as to the placement of employees, orientation to other areas when they change positions, termination and employment dates. The Department cites instances involving eight employees whose personnel records were not kept current. The testimony, in my judgment, supports a finding of substantial noncompliance on this score.

In deficiency number six, the Secretary cited K.A.R. 28-39-33(F), subsection (2), of which provides that a nursing home shall admit only those residents whose nursing care and physical needs can be provided by the staff and facility. Mrs. Hanson testified that a mentally retarded resident was retained in the facility, and that an appropriate program was not provided. The facility introduced Exhibits 4, 5 and 6, including a psychological and psychiatric evaluation which indicated that the resident was provided appropriate care in the facility. In my judgment, the evidence on this point does not support a finding that an appropriate program was not provided for this resident.

In deficiency number seven, the facility is cited for failure to have resident care policies which were reviewed

and revised by the professional advisory board to fit this facility, and for failure to have a qualified person responsible for the administration of such policies. The referenced regulation, K.A.R. 28-39-33(K), requires that the facility appoint in writing, a physician, registered nurse or medical staff to be responsible, whereas, in fact, the administrator, who lacked these qualifications, was identified as the responsible party. The evidence supports a finding of substantial noncompliance on this point.

In deficiency number eight, the facility is cited for window curtains which did not provide adequate privacy to the residents. Mrs. Hanson testified that certain windows had very sheer curtains, and no blinds, such that, at night, residents would not be afforded adequate privacy from the outside. She testified

that in rooms 42 and 43, there were no curtains at all. The facility denied having a room 43. Marshall Stauffer, for the facility, testified that all rooms, but number 27, had curtains, and it was being used as a storage room. He testified that blinds were installed in all occupied rooms, except rooms one and four. The facility introduced a number of curtain fabrics as exhibits, as to some of which Mrs. Hanson testified that they were not hanging in the facility on the date of the survey. Appellants' Exhibits 26, 27, 28 and 29 were offered as representative of the curtains hanging in the facility at the time. Appellant's Exhibits 25 and 30 were offered as representative of 30 of the rooms, and 26 through 29 as representative of four of them. Mrs. Hanson testified that she did not see all of the

exhibit curtains hanging, that some of those which were hanging were cotton and sheers, and were excessively sheer. Viewing the testimony as a whole, the exhibit curtains do not conclusively dispute the testimony and judgment of the surveyor, that those in place at the time of the survey were excessively sheer. However, she also testified that the curtains she saw were unacceptable unless blinds were installed in the rooms, and Marshall Stauffer testified that blinds were installed in all the rooms which were occupied. Viewing the evidence and testimony as a whole, I cannot find a substantial violation on this score.

In deficiency number nine, citing K.A.R. 28-39-36, the Secretary found that the occupational therapist was retained under a contract which called for her

presence at the facility for two to three hours each two months, but that she provided services only for one hour every two months. The referenced regulation, subsection (B), requires that the "facility shall maintain a rehabilitative program, either directly or through arrangements with qualified outside resources." While the consulting therapist apparently performed fewer hours of service than called for by her contract, it is not clear that the services which were provided were, in fact, adequate to meet the needs of the residents. Thus, I cannot find a substantial violation on this question.

The facility is cited under K.A.R. 28- 9-38(A) for failure to maintain an activity plan and program which meet the needs and interests of the residents. Mrs. Hanson testified that at the time of the survey, there were 16 residents

and one full-time activity director. She testified, on direct examination, that there were no activities scheduled for the days she was there, and that there were no activity plans for any of the sixteen residents. She stated that the only activity available was watching television, that the color was in extremely poor adjustment and caused discomfort to several residents.

The facility introduced a number of activity care plans prepared by Carol Stahl. activity director. Mrs.[sic]Stauffer testified that they had been prepared prior to the survey, and that he had assisted Ms. Stahl in their preparation. Mrs. Hanson testified that she had extensive conversations with Ms. Stahl about activity plans at the time of the survey, who told her that she had not developed activity plans for many residents. She

testified that on the survey dates, there was some crafts, some exercise, and television watching. She stated that residents complained of having too little to do. Regarding Appellant's Exhibit 7, which she could not recall affirmatively having seen during the survey, she stated that they were not being carried out.

The testimony of the witnesses for the Department supports the finding that the activity program and plans of care on the date of the survey were not sufficient to meet the needs and interests of the residents. Mrs. Hanson testified that during the exit interview, she advised the staff that what they had was "good," but that there were not enough activities. In my judgment, the evidence supports a finding of substantial noncompliance in the provision and furnishing of an adequate activity program and plan of care.

In deficiency number fifteen, the facility is cited for a violation of K.A.R. 28-39-41(B), that tray identification cards were removed from trays at the steam table. This is a violation of subsection (E)(19), rather than subsection (B). However, the facts of the violation were not substantially disputed, and the record supports a finding of substantial noncompliance on this deficiency.

In deficiency number sixteen, the Department alleges that food supplies were not always on hand to serve diets as ordered, that equal substitutes of caloric and nutritional content were not furnished. One meal was observed during the survey, on November 13, 1979. At that meal, pickled carrots were substituted for cole slaw because there was no cabbage on hand to prepare cole slaw. This substitution was not of equal nutritive value. Also, blue

plums were listed on the menu but because of an inadequate supply, peaches were substituted.

The question may be raised whether this demonstrates substantial noncompliance, with the referenced regulation, K.A.R. 28-39-41(B)(4). Monitoring of compliance is necessarily based upon random surveys, which seek to determine the operation of the facility on a random, but representative fashion. Here, in one meal, food supplies were inadequate to serve two separate dishes. In my estimation, this demonstrates substantial noncompliance with the referenced regulation.

In deficiency number seventeen, the facility is cited for failure to use standardized recipes appropriate for the number of residents. K.A.R. 28-39-41(B) is cited, whereas subsection (D)(1) imposes this requirement. Mrs. Hanson

testified that too much food was being prepared due to failure to use standardized recipes, resulting in excessive leftover food, some of which was served as leftovers. The testimony on this point was substantially undisputed, and the record supports a finding of substantial noncompliance on this point.

In deficiency number eighteen, the facility is cited for violating K.A.R. 28-39-41(D), due to an inoperative ice machine, a defective rinse faucet at the dishwashing facility, and a defective toaster. The toaster was repaired by November 21, 1979. Subsection (D)(9) requires that "ice shall be available for meal and room service." Testimony that the ice machine was inoperative was substantially undisputed. Mrs. Hanson expressed concern that transporting ice into the facility posed a risk of contami-

nation, and construed the regulation to require that ice be furnished from equipment in the facility. The regulation requires that ice be available for meal and room service, but not expressly that ice-making facilities be provided. There is no evidence that ice was not available as the regulation requires. I can find no substantial noncompliance on this point.

In deficiency number nineteen, the facility was cited for failure to maintain hot food in the steam table at 140 degrees F. Although the facility introduced evidence questioning whether the temperature measurement was accurate, the facility failed to discredit the method used by the surveyor in measuring the temperature of the food on the hot table at the time of the survey. The record supports a finding of substantial noncompliance on this point.

Regarding deficiency number twenty, Mrs. Hanson testified that the pharmaceutical policies and procedures were designed for a unit dose system, which was not being used by the facility. She testified that glass medicine cups were stored, unwashed, in a cabinet, that some medicine was improperly labeled, and lacked prescription numbers or directions for use. She also testified that some labels were soiled and illegible; that non-drug items were stored in the pharmacy room, and that the stop order did not specify narcotic stoppage. The facility offered evidence that no narcotics were being used in the facility at the time. The record abundantly supports a finding of substantial noncompliance on this point, for the Department's testimony regarding these deficiencies was largely and substantially undisputed. Likewise, the testimony supports a finding

of substantial noncompliance regarding deficiency number twenty-one, for it indicated that residents' medications were not stored separately, and that nondrug materials were stored in the drug room.

Regarding deficiency number twenty, Mrs. Hanson testified that she requested the resident records for all those residents who died or were discharged during the preceeding year, and that she found them in a disorganized and jumbled condition, in violation of K.A.R. 28-39-43(A), which requires maintenance of an organized record system in accordance with accepted professional standards and practices. The facility offered certain records to dispute this allegation, but Mrs. Hanson testified that when she inspected them at the date of the survey, they were not in the filed and bound condition in which

they were offered at the hearing. The record supports a finding of substantial noncompliance on this score.

Likewise, the record supports a finding of substantial noncompliance regarding deficiency number twenty-three, which requires that the medical records designee be a full-time employee. The testimony indicated that Trudy Stauffer was identified as the medical records designee, and that she was not a full-time employee of the facility.

Regarding deficiency number twenty-four, the facility is cited under K.A.R. 28-39-44(A) for isolation policies and procedures which were in need of revision to fit this facility. Mrs. Hanson stated that three or four policies had been borrowed from other facilities, had been combined in an awkward fashion, and that

they were in need of clarification to assure that there was a single, clear policy. The policy regarding cultures was incomplete, regarding flu was not workable, and there were no adequate instructions regarding cleaning materials, she testified. The regulation requires that written policies and procedures for investigating, controlling and preventing infection in the facility be adopted, and necessarily, that they be adequate and effective. The facility offered Exhibit 15, as infection control policies and procedures. The deficiencies cited by Mrs. Hanson were not substantially rebutted by the facility, and the record supports a finding of substantial noncompliance on this score.

In deficiency number twenty-five, the facility is cited under K.A.R. 29-

39-44(F) for maintaining inadequate water pressure in a water fountain, and a dripping faucet in one resident's room. The existence of these deficiencies are not substantially disputed. However, it is not clear that these are other than routine and incidental conditions of disrepair. The record does not support a finding of substantial noncompliance on this point.

Deficiencies numbered twenty-seven through thirty pertain to sanitation and infection control deficiencies. The facility was cited for having no exhaust fan in the soiled laundry room, under K.A.R. 28-39-44(C), and for the defective ice machine, a missing well joint board in the dining room, and an uncleaned shower, hole in a wall, and broken faucet in one resident's room, all under sub-

section (F). The existence of a defective ice machine was undisputed, and supports a finding of substantial failure to maintain mechanical equipment in good repair and operating condition. The testimony indicated that the shower which needed cleaning showed signs of neglect and inattention, resulting from more than occasional oversight or inadvertence. In my judgment, the record supports a finding of substantial noncompliance with regard to deficiencies numbered twenty-eight and thirty. The deficiencies in number twenty-seven and twenty-nine, while undisputed, do not appear to be substantial in nature.

The Secretary also found noncompliance in certain respects of a number of cited federal regulations, sufficient to support denial of certification. In large measure, the cited violations

parallel those discussed above. Accordingly, it is unnecessary to recite again the evidentiary presentations respecting those violations. The record supports a finding of substantial noncompliance respecting deficiencies numbered one, two, three, five, six, seven, nine, ten, eleven, twelve, thirteen, fourteen and fifteen.

In addition, the evidence offered by the Department supports the findings of the Secretary respecting repeated violations of law or rules and regulations adopted by the Secretary respecting the operation of intermediate care facilities.

Accordingly, and on the basis of the foregoing, it is my recommendation to the Secretary that the Order of January 8, 1980 denying the application for licensure

and for certification for the Broadacres Adult Care Home of Hutchinson, Kansas be affirmed.

July 17, 1980 /s/ John R. Martin

Date John R. Martin

Hearing Officer

(Omitting Certificate of Service)

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In The Matter Of The Licensure and Certification of the Reno County Adult Care Home Facility of Hutchinson, Kansas

Case No. 80-2

ORDER DENYING APPEAL

On this 9th day of May, 1980, the Secretary of the Kansas Department of Health and Environment, Joseph F. Harkins, receives the written report of Hearing Officer Arthur E. Palmer in this matter. Hearing Officer Palmer held hearings on March 10, 11, 12, 19 and 26, 1980, on the appeal from the Secretary's Order of Denial which was issued on January 15, 1980.

The Secretary has before him the

written report of Hearing Officer Palmer as well as a transcript of the proceeding, including exhibits. The Secretary hereby approves the hearing officer's report, attaches it to this Order as Exhibit A and incorporates it herein. The Secretary adopts the findings and conclusions of the hearing officer as his own. The Secretary finds that the grounds for the subject Order of Denial were and are correct except as modified by the hearing officer's report and therefore, the Secretary finds that his Order of Denial should be affirmed and the appeal of the Reno County Adult Care Facility be denied.

The Reno County Adult Care Facility shall be given fifteen (15) days after this decision is mailed to comply with the Secretary's Order as provided in K.S.A. 1979 Supp. 39-931.

The applicant shall have fifteen (15) days after receipt of a copy of this Order to appeal the Secretary's decision to District Court.

IT IS THEREFORE ORDERED BY THE SECRETARY that the appeal of the Reno County Adult Care Facility be, and the same is, hereby denied.

This Order entered and made effective this 19th day of May, 1980.

/s/ Joseph F. Harkins

Joseph F. Harkins, Secretary

(Omitting Certificate of Mailing)

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In the Matter of the Licensure and Certification of the Reno County Adult Care Home Facility of Hutchinson, Kansas.

Case No. 80-2

HEARING OFFICER'S REPORT TO THE SECRETARY

Preliminary Statement

Following a field survey concluded November 15, 1979, the Secretary entered his order on January 15, 1980, denying a license and certification as an intermediate care adult home to the Reno County Adult Care Home Facility of Hutchinson, Kansas (hereafter the "Facility"). A timely notice of appeal was filed by the Facility pursuant to K.S.A. 39-931,

specifying that the Secretary's Order was arbitrary and capricious, illegal or unjust because:

(1) The minimal level of care for residents required by statute is provided at the Facility;

(2) The violations of regulations cited by the Secretary do not affect the level of care provided residents;

(3) It was unreasonable to deny the Facility a license for violation of regulations when other facilities similarly situated are licensed;

(4) The Secretary applies the Rules and Regulations pertaining to adult care homes in an arbitrary manner and arbitrarily applies the statutory standard

of substantial compliance (K.S.A. Supp. 39-931) in licensing decisions;

(5) The facts do not support the deficiencies cited;

(6) The repeated violations of the regulations cited in the Secretary's Order of January 15, 1980, are not repeat violations within the meaning of K.S.A. 39-931a(b)(1).

(See, Transcript, Vol. I, pp. 13-19 and the Notice of Appeal.)

The Secretary appointed a hearing officer on January 31, 1980, and scheduled the appeal for February 11, 1980. On motion of the Facility, that hearing was continued by the Secretary, and at the Facility's request, another hearing officer was appointed on March 4, 1980. At

that time the hearing was rescheduled to March 10, 1980.

Evidence was heard on this appeal on March 10, 11, 12, 19 and 26, 1980, resulting in approximately 747 pages of transcript and the receipt of 23 exhibits and four files of the Department concerning other facilities. The parties waived oral argument. The Facility has submitted a brief and suggested findings of fact and conclusions of law within the time therefor allowed by the Hearing Officer. The Department waived submission of a brief and suggested findings of fact and conclusions of law.

The Hearing Officer reviewed the files of other care homes as requested by the Facility at the Department on April 30, 1980, but notes that part of the file for the Lyndon Care Home was not available for re-

view. Having considered the evidence and the briefs of the Facility, the Hearing Officer recommends to the Secretary the following:

Findings of Fact

1. The Facility is in violation of K.A.R. 28-39-33, 28-39-34, 28-39-36, and 28-39-38, for the reasons stated by the Secretary in paragraphs numbered 1 through 8 on pages 1 and 2 of his January 15, 1980, Order.

2. The evidence does not support the alleged violation of K.A.R. 28-39-33 (paragraph 9, page 2, of January 15, 1980, Order) since the circumstances of the particular admission did not practically admit of further preparation for the patient's (Rosa Baar) admission.

3. The Facility is in violation of K.A.R. 28-39-40 for not having documenta-

tion of a nurse aide certification on file for each employee. The Hearing Officer credits the testimony of Mrs. Hanson that no certificate was available for Wilimina Garwood. (Tr. Vol. II, p. 112; Vol. III, p. 195).

4. The Facility is in violation of K.A.R. 28-39-41(D)(8) and (19) in that eggs were not served at 140 degrees Fahrenheit, and the tray identification system was inadequate. The failure to have muffin tins does not result in a violation of any regulation.

5. The Facility is in violation of K.A.R. 28-39-42 for the reasons stated in paragraphs 12 and 13 on pages 2-3 of the Secretary's January 15, 1980, Order.

6. The Facility is in violation of K.A.R. 28-39-43 for the reasons stated in paragraphs 14, 15 and 16 on page 3 of the

Secretary's January 15, 1980, Order.

7. Although an effort was made by the Facility after the November 15, 1979, survey to get in more fire drills, at the time of the survey the Facility's Exhibit E itself reveals the Facility was in violation of K.A.R. 28-39-45.

8. The Facility is in violation of K.A.R. 28-39-41 and 28-39-44 for the reasons stated in paragraphs numbered 1 and 2 on page 3 of the Secretary's January 15, 1980, Order.

9. The laundry facility is constructed so that it results in a violation of K.A.R. 28-39-46(L)(d). This condition was pointed out to the architect who designed the Facility by letter from the Department on September 8, 1970, but is not mentioned in any other survey in the record until the November 15, 1979, survey.

10. The Facility is in violation of K.A.R. 28-39-48(K)(2) because there was no sign on the toilets for the handicapped.

11. The violations found in the proposed findings of fact numbered 1 through 10, and the evidence introduced, support a finding, and I so find, that the Facility was in violation of the cited federal regulations in paragraphs 2 through 19 on pages 4-6 of the Secretary's Order of January 15, 1980, except that I do not find that the failure to have muffin tins violates 42 C.F.R. 442.332.

12. (a) On pages 6 and 7 of the Secretary's Order of January 15, 1980, is a compilation which recites that on surveys from August 30, 1976, through the November 15, 1979, survey, certain regulations have been cited as violated on more than one occasion. The regulations cited

usually contain many detailed subprovisions. With a few exceptions in the area of writing and maintaining adequate policies and procedures, the particular violations of the regulations are not based on the same or similar factual circumstances and I have wholly discounted those areas where no violation was found in the November 15, 1979, survey, i.e., paragraphs numbered 3 and 8 on pages 6-7 of the Secretary's January 15, 1980, Order.

(b) Although not precluded from doing so, the Facility offered no evidence that the previous deficiencies cited in prior surveys were incorrect. I therefore find that the violations cited did occur except for the violations cited in the March 1, 1979, survey. As to that survey, the only violations considered are those found to exist on appeal listed in the Hearing

Officer's report of October 24, 1979, in Findings of Fact numbered 3 through 6.

(c) I find the following regulations to have been repeatedly violated by the Facility:

(i) K.A.R. 28-39-33(A)(1)

(ii) K.A.R. 28-39-33(A)(3)

(iii) K.A.R. 28-39-38(A)(1)

(iv) K.A.R. 28-39-41(D)(8)

(v) K.A.R. 28-39-45(B)

13. Residents at the Facility are not in immediate danger to life or health, but inadequate management programs clearly indicate that the Facility is not prepared to meet emergencies or untoward developments should they arise (e.g., Tr. Vol. II, pp. 53-55).

14. Since during the time of the survey no emergencies developed, the evidence does not show actual harm to residents from

the violations found.

15. A review of the files of the Secretary as requested by the Facility and a review of the Facility's Exhibit I do not indicate disparate treatment of the various facilities since in each the nature of the deficiencies cited varies and in each the plan of corrections offered was different, and in one case the plan even appears to include building a new facility to correct structural defects.

Conclusions of Law

1. Except for paragraph 9; the last sentence of 11, on page 2 of the January 15, 1980, Order; 1 on page 4 of the Order; and the last sentence of 13 on page 5 of the Order, the findings of fact made by the Secretary are supported by the evidence.

2. The lapse of nearly ten years in remedying the deficiency on the laundry

construction (paragraph 3, page 3, of the Order) makes reliance upon that deficiency for any purpose other than to require its correction unjust. Warburton v. Warkentin, 185 Kan. 468, 345 P.2d 992, Syl. 7. Of course, the delay in citing this deficiency does not prevent the Secretary from enforcing compliance. See, e.g., 73 C.J.S., Public Administrative Bodies, §261.

3. Although repeated violation of regulations exist, at least to the extent I have indicated in Finding of Fact 12 above, I do not recommend that the Secretary in his discretion invoke K.S.A. 1979 Supp., 39-931a. That statute is intended for situations where a facility by the same or similar facts has often violated a particular regulatory prohibition. The fact that since the regulations contain many individual prohibitions and thus a

particular numbered regulation may be violated by several wholly different facts militates against use of the statute except in cases where the facility refuses to correct a specified deficiency. There is no such refusal here, only an inability for some reason to meet the requirements for administration. I have considered, however, and do recommend that the Secretary consider, the fact that this facility has been unable to comply with the regulations on administration after repeated deficiencies in the general area. "The revocation of a license for repeated violations of a statute is not improper merely because the revoking authority has failed to revoke the licenses of other licensees for single violations."
53 C.J.S., Licenses, §44, p. 652.

4. The statutory standard for li-

censing is that a license is to be granted unless the Secretary finds "a substantial failure to comply with the requirements." The inverse of substantial failure to comply would seem to be "substantial compliance," which requires compliance in respect to essential matters necessary to assure every reasonable objective of the statute. City of Kansas City v. Board of County Commissioners, 213 Kan. 777, 785, 518 P.2d 403 (1974). The purposes of the licensing statutes for adult care homes are set out in K.S.A. 1979 Supp. 39-924. Basically, they are to promote safe and adequate accomodations, care and treatment of residents. Some of the deficiencies found at the Facility could never support a denial of licensure standing on their own. Examples are the required signs on handicapped toilets used by visitors,

the failure to have the right piece of paper showing one employee's licensure, and having the administrator's home telephone number in the disaster plan. However, the deficiencies taken as a whole do show a substantial failure on the part of the Facility's administration to comply with the regulations requiring policies and procedures to prepare the staff for untoward events such as disasters or infections, or for the care and activities of residents.

5. This facility has had over one year to obtain the type of administration needed to substantially comply with the requirements for licensure and its failure cannot be forever countenanced. While perfection in compliance with the requirements would appear to be a feat not likely to be obtained by any facility, the

Secretary must insist on a better compliance than shown here when an operator has been denied licensure (See May 3, 1979, Order, affirmed October 24, 1979) and reapplies.

6. The licensing statutes grant the Secretary discretion in determining qualifications for a license as indicated by the "substantial failure to comply" test of K.S.A. 1979 Supp., 39-931. "The power to exercise an honest discretion includes the power to make an honest mistake of judgment and the power of administrative bodies to decide questions is not confined to deciding them correctly." 73 C.J.S., Public Administrative Bodies, §61. There is no evidence in this record of arbitrary or capricious treatment of facilities by the Secretary, and accepting, arguendo, the Facility's factual claims, its argu-

ment would reduce to a claim that the Secretary has mistakenly granted a license to other facilities who do not substantially comply with the licensing requirements and should here repeat that error. As indicated above, I do not find that the Secretary has in fact so acted and do not accept the legal argument following even if such facts were proved. Compare, Coggins v. Public Employee Relations Board, 2 Kan.App.2d 416, 581 P.2d 817 (Syl. 3), and Warburton v. Warkentin, 185 Kan. 468, 477, 345 P.2d 992, where the Court states:

> "Certainly an administrative agency, charged with the protection of the public interest, is not precluded from taking appropriate action to that end because of mistaken action on its part in the past."

Recommendation

The Hearing Officer recommends that:

1. The Secretary's Order of January 15, 1980, be affirmed as modified.

2. The application of the Reno County Adult Care Facility for licensure and certification be denied.

Dated at Topeka, Kansas, this 7th day of May, 1980.

/s/Arthur E. Palmer

Arthur E. Palmer,

Hearing Officer

BEFORE THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT

In The Matter Of The Licensure And Certification Of The Reno County Adult Care Facility Of Hutchinson, Kansas

80-2

DENIAL ORDER FOR LICENSURE AND CERTIFICATION

Now on this 15th day of January, 1980, the Secretary of the Kansas Department of Health and Environment, Joseph F. Harkins, considers the application filed on October 24, 1979 by the operators of the subject facility for a license to operate an intermediate care adult care home and also their application for certification as meeting Medicaid Regulatory Requirements filed November 1, 1979.

The Secretary finds, upon further examination of his files, that the facility was inspected, or surveyed, on November 15, 1979, for the purposes of licensure and certification; the results of that inspection were provided to the administrator of the facility during a so-called "exit interview" on November 21, 1979. A report of that inspection has been submitted to the Secretary's office and is before the Secretary.

The Secretary finds that the application for licensure of the Reno County Adult Care Facility should be denied for the reason that the facility is in substantial failure to comply with the requirements, standards and regulations promulgated by the Secretary. The Secretary finds that the applicant is not in substantial compliance with the following state licensure regulations:

1. K.A.R. 28-39-33 Administration. (A) Management. Policies and procedures need to be revised to fit this facility and procedures are needed to govern all areas and function.
2. K.A.R. 28-39-33 Same. (A) Management. Administrator needs to maintain communication with nursing staff and other departments in regard to new admission so person is on duty to process admission material when new residents are admitted.
3. K.A.R. 28-39-33 Same. (J) Resident rights. Policies states that resident can be discharged for complaining in the facility.
4. K.A.R. 28-39-33 Same. (K) Development and review of resident

care policies. Committee has reviewed, but has not revised policies to fit this facility.

5. K.A.R. 28-39-34 Resident services. (B) Resident care plan. Total care plan is not a useful tool in management of care. All goals need to be measureable.

6. K.A.R. 28-39-36 Rehabilitative services. (A) Plan of care. No rehabilitation plan of care available.

7. K.A.R. 28-39-38 Activities services. (A) Programming. The activity program needs to be expanded to meet the needs of independent and group activities for each resident.

8. K.A.R. 28-39-38 Same. (C) Recreation areas. Recreation equipment

appropriate for residents needs to be obtained.

9. K.A.R. 28-39-39 Physician services. (B) Medical findings and physician's orders at time of admission. Medical information for new residents needs to be processed immediately upon admission so that care may be given as ordered.

10. K.A.R. 28-39-40 Health services. (D) Nursing home aide qualifications. Documentation of nurse aide certification is not kept on file for each employee.

11. K.A.R. 28-39-41 Dietetic services. (D) Preparation and service. Hot food (eggs) served at 112 degrees F. Tray identification system is not legible and is not left on special diet trays to identify

food consumed. Muffin tins need to be purchased so that menus can be followed.

12. K.A.R. 28-39-42 Pharmaceutical services. (B) Physician orders. All legend drugs need to be under prescription.

13. K.A.R. 28-39-42 Same. (E) Administration of medications. Drug room needs to be kept free of all personal care items and items that need to be stored in clean and soiled utility room.
Emergency kit needs to be sealed and dated.
Policies and procedures for emergency drugs need to be followed.
Policies on self administration of drugs needs to be clarified.

14. K.A.R. 28-39-43 Resident record.

(A) Record keeping. Close records need to be organized according to policies and procedures.

15. K.A.R. 28-39-43 Same. (B) Content. Two of records checked lacked past medical history.

16. K.A.R. 28-39-43 Same. (D) Staffing. No full-time employee responsible for medical records.

17. K.A.R. 28-39-45 Disaster preparedness. (B) Fire drills. Fire drills are not held four times a year on 11-7 shift and 3-11 shift is combined with day shift.

The exit interview for the following deficiencies was held on December 11, 1979. These deficiencies pertain to infection control and sanitation. The Secretary finds that the applicant is not in compliance with the additional following state licensure regulations:

1. K.A.R. 28-39-41 Same. (F) Sanitation. Final rinse temp on dishwashing machine is 160 degrees. Must be 170 degrees F.
2. K.A.R. 28-39-44 Infection control and sanitation. (A) Infection control committee. Policies and procedures for investigating, controlling and prevention of infections are not appropriate for this facility.
3. K.A.R. 28-39-44 Same. (C) Housekeeping. Must provide functional separation in laundry.
4. K.A.R. 28-39-31 Licensing procedure. (B) Renewal of license and K.A.R. 28-39-48 Construction requirements. (I) Codes and standards. Need sign on handicapped toilets.

The Secretary finds that the applicant should be denied certification for the reason that the facility is not in compliance with the following federal regulations:

1. 42 C.F.R. 442.251 State Licensure. Facility has not been licensed since 3/24/79.
2. 42 C.F.R. 442.302 Staffing. Certificate for one nurse aide is not on file.
3. 42 C.F.R. 442.303 (b) Administrator. Communication with staff members and administration needs to be improved to implement policies and procedures and provide general direction.
4. 42 C.F.R. 442.303 (b) and 442.305 Written Policies and Procedures and Administrator. Policies and procedures need to be

revised to fit this facility and be in compliance with State and Federal regulations.

5. 42 C.F.R. 442.305 (a) Written Policies and Procedures and Administrator. Policies and procedures are not available to govern all areas of service.

6. 42 C.F.R. 442.307 (b) Written Policies and Procedures - Transfer and Discharge. Five-day clause for notice for dismissal is not included in discharge policy.

7. 42 C.F.R. 442.308 Written Policies and Procedures and Physical and Chemical Restraints. Physical and chemical restraint policy and procedure did not define the use of restraints and did not identify

the professional who may authorize the application of restraints in emergencies. Mechanism for monitoring and controlling had not been developed.

8. 42 C.F.R. 442.309 Written Policies and Procedures. Resident policy on complaints stated that "Upon habitual and repeated complaint from the resident and/or family the transfer and discharge policy will be utilized and the resident will be required to move elsewhere."

9. 42 C.F.R. 442.313 Emergencies. Only three fire drills have been held during past year on the 11-7 shift. 3-11 shift drills need to be held separately from 7-3 shift. Disaster plans need to be

updated including administrator's current telephone number.

10. 42 C.F.R. 442.318 (c) (2) Resident Record. Two of records reviewed lacked past medical histories.

11. 42 C.F.R. 442.318 (c) (3) Resident Record System. The overall plan of care is not developed as a useful tool in management of care. Goals were not measurable.

12. 42 C.F.R. 442.318 (c)(4) Resident Record System. Follow-up notes on PRN orders are not always being done.

13. 42 C.F.R. 442.332 Menu Planning and Supervision. Eggs were served at 112 degrees F. Tray identification system needs to be legible and left on tray to point of return to identify food consumed on

therapeutic diets. Muffin tins need to be purchased to serve menus as written.

14. 42 C.F.R. 442-333 (b) Licensed Pharmacist. Policies and procedures for control of emergency drugs needs to be followed. All legend drugs need to be under prescription. Emergency kit needs to be sealed and dated. Drug room needs to be kept free of all personal care items that should be stored in clean and soiled utility rooms.

15. 42 C.F.R. 442.336 (a) Medication Review. All medication reviews need to be dated.

16. 42 C.F.R. 442.337 (b) Administration of Medications. Facility has conflicting policies con-

cerning self administration of medications.

17. 42 C.F.R. 442.343 (e) Rehabilitative Services. Facility did not have any rehabilitation plans of care developed for any residents. Staff member was unaware of responsibility for this.

18. 42 C.F.R.442.345 (c) Activities Program. Activity plan for independent and group activities is not developed to meet the needs and interests of each resident. Relief is not provided for Activity Director when she is absent, so program is not being carried out.

19. 42 C.F.R 442.345 (d) Activities Program. Equipment and materials are not available to carry out an

activity program appropriate for residents.

The Secretary further finds that the subject licensure application should be denied, in addition to the grounds above stated, because the applicant has repeatedly violated provisions of law or rules and regulations adopted by the Secretary pursuant to Article 9 of Chapter 39 of the Kansas Statutes Annotated, within the meaning and scope of K.S.A. 1979 Supp. 39-931a. The violations which have been observed in the subject facility are as follows:

No.	Regulation Violated	Dates of Repeated Violation
1.	KAR 28-39-33 Administration	August 30, 1976 May 17, 1977 May 4, 1978 July 10, 1978 March 19, 1979

		November 15, 1979
2.	KAR 28-39-34	March 19, 1979
	Resident services	November 15, 1979
3.	KAR 28-39-35	July 10, 1978
	Diagnostic &	March 19, 1979
	dental services	
4.	KAR 28-39-36	March 19, 1979
	Rehabilitative	November 11, 1979
	services	
5.	KAR 28-39-38	August 30, 1976
	Activities services	May 4, 1979
		May 17, 1979
		March 19, 1979
		November 15, 1979
6.	KAR 28-39-39	July 10, 1978
	Physician services	March 19, 1979
		November 15, 1979
7.	KAR 28-39-40	May 17, 1977
	Health services	July 10, 1978
		March 19, 1979
		November 15, 1979

8.	KAR 28-39-41	July 10, 1978
	Dietetic services	March 19, 1979
9.	KAR 28-39-42	August 30, 1976
	Pharmaceutical	May 17, 1977
	services	March 19, 1979
		November 15, 1979
10.	KAR 28-39-43	August 30, 1976
	Resident records	May 17, 1977
		July 10, 1978
		March 19, 1979
		November 15, 1979
11.	KAR 28-39-44	March 19, 1979
	Infection control	November 15, 1979
	and sanitation	
12.	KAR 28-39-45	July 10, 1978
	Disaster	March 10, 1979
	Preparedness	

It is therefore by the Secretary ordered that the subject application for licensure and certificate for the Reno County Adult Care Facility be denied.

IT IS BY THE SECRETARY SO ORDERED.

Dated this 15th day of January, 1980.

/s/ Joseph F. Harkins

Joseph F. Harkins, Secretary

(Omitting Certificate of Mailing)

K.A.R. 28-39-33 (1978)

28-39-33. Administration. (A) Management. The licensee or designated person so functioning shall have full legal authority and responsibility for the operation of the intermediate care home and compliance with licensing requirements.

(1) The licensee, through the administrator, shall adopt and enforce acceptable policies and procedures relative to:

(a) The health care, safety, social, psychological, and self-esteem needs of the resident.

(b) Protection of personal and property rights of the residents.

(c) The general operation of the facility.

(2) The licensee shall provide ownership information as follows:

(a) The identity of each person who

has any direct or indirect ownership interest of 10 percent or more in the facility or who is the owner (in whole or in part) of any mortgage, deed of trust, note, or other obligation secured (in whole or in part) by such facility or any of the property or assets of such facility.

(b) In case a facility is organized as a corporation, of each officer and director of the corporation.

(c) In case a facility is organized as a partnership, of each partner.

(d) Prompt reports of any changes which would affect the current accuracy of the information required.

(3) The licensee shall adopt effective administrative and resident care policies and procedures governing the operation of the facility. They shall be

reviewed and revised in writing as necessary and shall be posted and available on request to all personnel concerned and to the general public.

(4) The licensee shall appoint a full-time licensed administrator who is responsible for the overall management of the facility including:

(a) Enforcing the policies and procedures relative to the level of health care and safety of residents and to the protection of their personal and property rights.

(b) Planning, organizing, and directing those responsibilities delegated to him by the licensee.

(c) Maintaining, through meetings and periodic reports, ongoing liaison with the licensee, medical and nursing staff, and other professional and supervisory staff.

(d) Studying and acting upon recommen-

dations made by the advisory committee and other committees.

(e) Authorizing, in writing, a responsible employee 18 years old or over to act on his behalf in his absence.

(B) Advisory committee. (1) The facility shall have an advisory committee consisting of a physician, a nurse, a religious advisor, and other local citizens who will give advice and counsel to the administrator on matters of resident and community interest.

(2) The committee shall meet as often as necessary but not less than once every six months. Minutes of each meeting shall be kept on file in the facility.

(C) Personnel policies and procedures. (1) The licensee, through the administrator, is responsible for implementing and maintaining written personnel policies, proce-

dures, and job-descriptions that support sound resident care and personnel practices.

(2) Personnel records shall be kept current and available for each employee and contain information to support placement in the position to which the employee is assigned.

(3) Written policies for control of communicable disease are in effect to ensure that employees with symptoms or signs of communicable disease or infected skin lesions are not permitted to work.

(4) All employees shall have a pre-employment physical examination and subsequent annual physical examination. The physical examination must be completed and the report available when the employee reports for work.

(5) In case of an emergency where the needed personal care of a resident would suffer without the immediate employment of an individual, he may be temporarily employed, provided a physical examination is completed within a ten-day period.

(6) No employee shall be punished or harrassed by the facility or by its agent because of the efforts to avail himself of his rights.

(7) There shall be written policies that provide for the registration of employee complaints without threat of discharge or other reprisals.

(8) Report of health examinations will be filed in the employee's personnel record.

(D) Staff development. (1) There shall be an ongoing educational program

which is planned and conducted for the development and improvement of skills of all the facility's personnel, including training related to problems and needs of the aged, ill, and disabled.

(2) Each employee shall receive appropriate orientation to the facility and its policies and to his position and duties.

(3) There shall be inservice training which includes at least prevention and control of infections, fire prevention and safety, accident prevention, cofidentiality of resident information, psycho-social needs of residents, restorative nursing techniques, and preservation of resident dignity, including protection of his privacy and personal property rights.

(4) Written records shall be maintained which indicate the content of and

attendance at such staff development programs.

(E) Use of outside resources. (1) If the facility does not employ a qualified professional person to render a specific service to be provided by the facility, it shall make arrangements to have such a service provided by an outside resource, a person or agency that will render direct service to residents or act as a consultant to the facility.

(2) The responsibilities, functions, and objectives and the terms of agreement, including financial arrangements and charges of each such outside resource, shall be delineated in writing and signed by an authorized representative of the facility and the person or agency providing the service.

(3) The outside resource, when acting

as a consultant, shall apprise the administrator of recommendations, plans for implementation, and continuing assessment through dated, signed reports which are retained by the administrator for follow-up action and evaluation of performance.

(4) The facility shall not accept or shall discharge a resident requiring, according to attending physician's orders, the services of an unavailable qualified consultant.

(F) Admission policy. (1) A nursing home shall not obtain from or on behalf of residents any release from liabilities or duties imposed by the general law or these regulations, except as part of formal settlement in litigation.

(2) A nursing home shall admit only those residents whose nursing care and physical needs can be provided by the

staff and facility.

(3) All residents admitted shall be under the care of a physician licensed to practice in Kansas.

(4) Upon admission or within 48 hours of admission, referral information must be made available. Referral form shall include personal and social data of the resident, medical history, diagnosis, activities permitted, and such other information as to provide a continuum of care for the resident.

(5) Prior to admission, the prospective resident or his agent shall be informed in writing about the rates and charges and the resident's obligations regarding payment. This information shall include refund policies.

(6) At the time of admission, the licensee shall execute a written agreement

with the resident or his authorized agent which describes in detail all goods and services which the resident can expect to receive and which sets forth any obligations which the resident has toward the licensee.

(7) A resident who becomes mentally disturbed or whose social or medical condition changes after admission and who may cause injury to himself or others may be treated in the facility by appropriate medical management and supervision. If the resident cannot be managed, immediate arrangements shall be made by the attending physician for the transfer of the resident to an appropriate facility at the earliest practical time.

(8) As changes occur in the resident's physical condition which necessitate a change in care which the facility is not

prepared to give, immediate arrangements must be made to have the resident transferred to another appropriate facility which can care for the resident.

(9) When a resident's condition changes, it is not necessary to transfer a resident within or between facilities when, in the opinion of the attending physician, such transfer might be harmful to the physical and mental health of the resident. The physician must document accordingly on the resident's record.

(10) Residents with any disease in the communicable stage shall not be admitted to the facility.

(11) Residents who, in the opinion of a qualified physician, are not infectious and are receiving appropriate anti-tuberculosis chemotherapy may be admitted to the facility.

(12) A resident who develops a communicable disease after admission shall be medically isolated from other residents. If he cannot or should not be managed in the facility, immediate arrangements shall be made by the attending physician for the transfer of the resident to an appropriate facility at the earliest practical time.

(13) The fact that a resident develops a communicable disease after admission shall be reported to the appropriate health agencies.

(14) When a communicable disease develops, adequate steps shall be taken to determine the source and degree of dissemination of the disease.

(15) The following persons cannot be admitted as residents:

(a) Children under 16 years of age.

(b) Any woman who is pregnant or any woman within three months following pregnancy.

(c) Any person having a communicable disease.

(d) Any person in need of treatment for alcoholism or drug addiction.

(e) Any person who is a disturbed mental patient or any person for whom the continuous use of restraints is necessary for his protection or the protection of others.

(G) Residents' Personal Belongings. (1) Inventory of personal belongings should be completed at the time of admission.

(2) A written account shall be maintained on a current basis for each resident with written receipts for all personal possessions and funds received or

deposited with the facility and for all expenditures and disbursements made in behalf of the resident.

(3) No nursing home administrator shall handle a resident's personal funds without first being requested to do so in writing by the resident or his agent.

(H) Discharge Policy. (1) There shall be a centralized coordinated discharge plan to ensure that each resident has a program of needed continuing care both during his stay and after discharge from the facility. This plan must be developed within seven days of admission.

(2) Except in an emergency, a resident shall not be transferred or discharged from the facility without prior notification of next of kin or sponsor. Suitable clinical notes, list of orders, and all medications as directed by the attending

physician shall accompany the resident if he is sent to another medical facility.

(I) Notification of Change in Resident Status. (1) The facility shall have written policies and procedures which relate to notification of the resident's attending physician and other responsible persons in the event of significant change in the resident's physical, mental, or emotional status or resident's charges, billing, and related administrative matters.

(2) Except in a medical emergency, a resident shall not be transferred or discharged, nor shall treatment be altered radically without consultation with the resident, or if he is incompetent, without prior notification of next of kin or sponsor.

(J) Resident rights. (1) The licen-

see of the facility shall establish written policies regarding the rights and the responsibilities of residents and, through the administrator, is responsible for development of an adherence to procedures implementing such policies.

(2) These policies and procedures shall be made available to residents, any guardians, next of kin, sponsoring agency(ices), or responsible persons.

(3) There shall be available to staff, residents, consumer groups, and interested public, the policies of the facility, including a written outline of its objectives and a statement of the rights of its residents. These policies must set forth the rights of the residents and prohibit mistreatment and abuse of the residents.

(4) The staff of the facility shall be trained and involved in the implementa-

tion of these policies and procedures.

(5) The resident shall be fully informed, as evidenced by the resident's written acknowledgement prior to or at the time of admission and during stay, of these rights and of all rules and regulations governing resident conduct and responsibilities.

(6) The resident shall be fully informed, prior to or at the time of admission and during his stay, of services available in the facility and of related charges, including any charges for services not covered under medicare or medicaid programs or not covered by the facility's basic rate.

(7) The physician shall inform the resident of his medical condition unless it is medically contraindicated (as documented in the medical record) and the

resident shall be afforded the opportunity to participate in the planning of his medical treatment. The resident has the right to refuse to participate in experimental research.

(8) The resident shall be transferred or discharged only for medical reasons or for his welfare or that of other residents or for nonpayment for his stay. The resident shall be given advance notice to ensure orderly transfer or discharge. Such actions are documented in the resident's medical record.

(9) The resident is encouraged and assisted throughout his period of stay to exercise his rights as a resident and as a citizen and to this end may voice grievances and recommend changes in policies and services to facility staff and/or to outside representatives of his

choice, free from restraint, interference, coercion, discrimination, or reprisal.

(10) The resident may manage his personal financial affairs.

(11) If the facility accepts the responsibility for the resident's financial affairs, the resident must designate the transfer of responsibility in writing. Further, the facility must give the resident an accounting of all financial transactions made on the resident's behalf. This accounting must be done at least quarterly.

(12) The resident shall be free from mental and physical abuse. The resident shall also be free from chemical and (except in emergencies) physical restraints, except as authorized in writing by a physician for a specified and limited period of time or when it is necessary to protect the resident from injury to himself and to others.

(13) The resident shall be assured confidential treatment of his personal and medical records and may approve or refuse their release to any individual outside the facility, except in case of his transfer to another health care institution or as required by law or third-party payment contract.

(14) The resident shall be treated with consideration, respect, and full recognition of his dignity and individuality, including privacy in treatment and in care for his personal needs.

(15) The resident shall not be required to perform services for the facility that are not included for therapeutic purposes in his plan of care.

(16) The resident shall be permitted to associate and communicate privately with persons of his choice and to send and

receive his personal mail unopened, unless medically contraindicated (as documented by his physician in the medical record).

(17) The resident shall be permitted to participate in social and religious activities.

(18) The resident shall be permitted to meet with community groups at his discretion unless medically contraindicated (as documented by his physician in his medical record).

(19) The resident shall be permitted to retain and use his personal clothing and possessions unless to do so would infringe upon rights of other residents and unless medically contraindicated (as documented by his physician in his medical record).

(20) If married, the resident is assured privacy for visits by his/her spouse. If both are residents in the facility, they

are permitted to share a room unless medically contraindicated (as documented by the attending physician in the medical record).

(21) The aforementioned resident rights shall be reflected in the facility's policies and procedures.

(22) The resident shall have the right to choose his own pharmacy where goods and services for personal use are purchased except for prescription medications when the facility provides a "unit does" or similar medication distribution system.

(K) Development and review of resident care policies. (1) The facility shall have policies which are developed by the medical director or the organized medical staff with the advice of a group of professional personnel, including one or more physicians

and registered nurses, in the capacity of an advisory committee.

(2) The policies shall govern the supervised nursing care and medical care or other related services it provides.

(3) The policies, which shall be available to admitting physicians, sponsoring agencies, residents, and the public, shall reflect awareness of and provisions for meeting the total medical and psychosocial needs of residents, including admission, transfer, discharge planning, and range of services available to residents, including frequency of physician visits.

(4) These policies shall include provisions to protect residents' personal and property rights.

(5) Medical records and minutes of staff and committee meetings shall reflect that resident care is being rendered in

accordance with the written resident care policies.

(6) The facility shall appoint in writing a physician, a registered nurse, or a medical staff to be responsible for the execution of such policies.

(7) If the responsibility for day-to-day execution of resident care policies has been delegated to a registered nurse, the facility shall make available an advisory physician from whom she or he receives medical guidance.

(8) These policies shall be reviewed at least annually.

(9) The policies shall be designed to ensure that each resident receives treatments, medications, and diets as prescribed and rehabilitative nursing care as prescribed and as needed.

(10) The policies shall be designed to assure that the resident receives pro-

per care to prevent decubitus ulcers and deformities; that the resident is kept comfortable, clean, well-groomed, and protected from accident, injury, and infection; and that the resident is encouraged, assisted, and trained in self-care and group activities.

(L) Power of attorney and guardianship. (1) "Power of attorney" and/or guardianship shall not be assumed for any resident by anyone employed by or having a financial interest in the adult care home.

(2) When there is apparent incapacity of a resident to manage his affairs and there is no adverse family interest, the administrator shall notify the family to initiate guardianship proceedings.

(3) The administrator may initiate guardianship proceedings on behalf of the resident if he has no family or if

there is adverse family interest or if the family fails to act.

(M) Reports. (1) The administrator shall submit to the licensing agency, not later than ten days following the month covered, a monthly report of residents and employees. This report shall be submitted on forms provided by the licensing agency.

(2) A report of each accident which involves a resident shall be filed within 24 hours following the occurrence. The report shall be filed using forms provided by the licensing agency.

(3) The administrator shall submit any other reports required by statute or regulations.

(N) Resident's mail. All incoming mail shall be promptly delivered to the resident intact and unopened unless con-

traindicated by the resident's physician in writing for medical reasons. All outgoing mail dispatched by a resident shall be promptly mailed.

(O) Emergency telephone. Each facility shall maintain at least one noncoin operated telephone accessible to employees for use in emergencies. The names and telephone numbers of persons and places commonly required in emergencies shall be posted beside the telephone.

(P) Posting of regulations. All current regulations under the section entitled HEALTH SERVICES relating to personal hygiene and the entire section entitled REHABILITATIVE SERVICES shall be posted in a conspicuous location in the facility where they can be observed by both residents and visitors. (Authorized by K.S.A. 39-932; effective Feb. 15, 1977.)

42 C.F.R. §442.251 (1979)

§442.251 State licensing standards.

(a) Except as provided in paragraph (b) of this section, an ICF must meet standards for a State license to provide, on a regular basis, health-related care and services to individuals who do not require hospital or SNF care, but whose mental or physical condition requires services-

(1) Above the level of room and board; and

(2) That can be provided only by an institution.

(b) An ICF that formerly met State licensing standards but does not currently meet them may continue to receive Medicaid payments as a qualified provider during a period specified by the State authority responsible for licensing the facility if,

during that period, the ICF takes the steps needed to again meet the standards.

(c) An ICF operated by a government agency must meet the licensing standards that apply to the same type of facility operated under any other ownership.

(d) In accordance with §431.110 of this subchapter, an Indian Health Service ICF must meet State licensing standards although it need not obtain a license. In making this determination, the licensing authority may not take into account an absence of licensure of any staff member of the facility.